DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

AEG
Docket No. 3138-99
26 September 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [redacted]

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case Summary
(2) Subject's Marine Corps and Navy Service Records
(3) Subject's Medical and DVA Records

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Marine Corps and Navy, applied to this Board requesting that the record be corrected to show that he was not discharged on 12 May 1996 but continued to serve until he attained 20 years of active service and, on that date, was transferred to the Fleet Reserve or retired by reason of physical disability. He further requests a correction to show that he was reinstated to the rate of chief mess management specialist (MSC; E-7) prior to retirement.

2. The Board, consisting of Messrs. Pfeiffer and Morgan and Ms. LeBlanc, reviewed Petitioner's allegations of error and injustice on 11 September 2000 and, pursuant to its regulations, determined that the partial corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. Petitioner began his military service on 16 January 1967 by enlisting in the Marine Corps. After completing boot camp and a period of further training, he reported to a unit in Vietnam in July 1967 as a rifleman. He then participated in several operations against the enemy and was advanced to lance corporal (E-3). On 3 November 1967, he was wounded in action.

He left Vietnam on 30 January 1968 and was transferred to a naval hospital, and then back to the United States. He was promoted to corporal (E-4) on 1 March 1968. In December 1968 he received nonjudicial punishment for a minor uniform violation, but was promoted to sergeant (E-5) in April 1969. On 27 February 1970, he was released from active duty. Among the awards and decorations listed on his Certificate of Release or Discharge from Active Duty (DD Form 214) are the Purple Heart, Good Conduct Medal, Combat Action Ribbon, Vietnam Service Medal and Vietnamese Campaign Medal. A notation on the DD Form 214 states that "total service was outstanding in performance and conduct." Upon completion of his military obligation on 26 October 1972, Petitioner was honorably discharged from the Marine Corps.

d. Petitioner then had no affiliation with the armed services until 24 February 1981, when he enlisted in the Navy in the rate of seaman (SN; E-3). He then served in an excellent to outstanding manner, attaining excellent marks, receiving at least one certificate of commendation and advancing in due course to mess management specialist second class (MS2; E-5). Petitioner's medical record reflects two incidents in 1981 in which he was intoxicated upon returning to the ship. Despite these incidents, there is no indication in the record that Petitioner was ever examined for possible alcoholism.

e. Petitioner reenlisted in December 1984 and subsequently was reassigned to the Fleet Aviation Specialized Operational Training Group, Pacific Fleet (FASOTRAGRUPAC) detachment at Warner Springs, CA. The record reflects that he continued to serve in an excellent manner and received at least one letter of appreciation. However, on 19 August 1985, he asked for help with his drinking problem after he became verbally abusive and had to be stopped from driving while drunk. Petitioner was examined by a medical officer on 19 August 1985 and the lengthy medical record entry of that date reads, in part, as follows:

> (Petitioner's) drinking dates back to his prior service in Vietnam. He was in the Marines on active duty from 1966-1970 and inactive 2 yr. until 1971. He did two tours in Vietnam, 64 + 68 as a weapons specialist doing front line seek + destroy missions. He witnessed numerous close friends killed + wounded as well as killed in missions civilian women + children "when it was so dark you couldn't see your hand in front of you." He began drinking heavily in the field (and increased) amounts needed to get drunk and "relieve your nerves." He went to school in 70-71 as an inactive reserve and retired from the USMC in 71 as an E-5. During the early + mid 70's he continued to drink frequently 2-3x/wk. (with) occasional blackouts. He cites a tremendous amount of anger at how he + veterans were treated as a driving factor in this stage of his life. The memories of Vietnam bothered him only when he was intoxicated. When he was sober he was able to deal with the memories. He has never had nightmares. However, other

> factors in his life were a divorce . . ., inability to hold a steady responsible job, a mother who he was close to who slowly deteriorated before death in 1979 (of) metastatic ovarian (cancer). While he had no DUI's (usually drank at home), he did find himself picked up by the police for drunk and disorderly conduct (about) five times in the 70's requiring overnight detoxification. He has never been hospitalized for (delirium tremens). He has never received counseling or inpatient (treatment) for ETOH (alcohol). He stopped drinking heavily in 1978-79.

The medical officer diagnosed Petitioner as an alcoholic with abuse and dependency, and recommended inpatient (level III) treatment. He also referred Petitioner for antabuse screening and indicated that this medication would be prescribed prior to attendance at Level III.

f. Petitioner was admitted to the Level III program at the Alcohol Rehabilitation Center (ARC), Naval Hospital, San Diego, CA on 16 September 1985 and was released on 28 October 1985. The report of his treatment prepared upon his release notes that the admission diagnoses were alcohol dependence and alcoholism in the family. Petitioner's case history indicates that his father was an alcoholic and Petitioner "was raised in an abusive home." He had his first drink at age 15 and, as previously noted, "his drinking escalated significantly at age 20 during his Vietnam service." Spouse abuse, increased tolerance and blackouts and civil arrests for drunk and disorderly conduct were also noted. However, Petitioner denied withdrawal symptoms, delirium tremens or seizures. Concerning the treatment regimen, Petitioner attended nightly meetings of Alcoholics Anonymous and another group for children of alcoholics, and was put through several other programs, including formal alcoholism education. Daily antabuse was mandatory. The report then states as follows:

> (Petitioner's) response to treatment was marked by a lack of trust of other group members. He then began to open up and share feelings of guilt around Vietnam and what he had done when drinking. The patient began to share the shame for the abuse he received from his alcoholic father, and the abuse he inflicted on his current wife. As his treatment progressed he began to look at his own part in causing the problems that confronted him. He began to do less blaming and started to take more responsibility for his own actions. He also began to take responsibility for his part in the marital problems. The patient was able to utilize feedback from group members. The patient responded to his midtreatment summary review by renewing his interest in art. He obtained a sponsor and states that he plans to work on his Vietnam issues through the Veterans Center. . .

Petitioner's discharge diagnosis was alcoholism in remission and alcoholism in the family. He was directed to take antabuse and participate in a formal aftercare program for six months. AA

meetings, marriage counseling and weekly interviews with the local substance abuse coordinator were also required. Entries in the medical record indicate that Petitioner's program of aftercare went without incident.

g. Petitioner then continued to serve well at FASOTRAGRUPAC and was advanced to MS1 (E-6) on 16 June 1987. However, two months later, he was picked up for public drunkenness by the San Diego Police Department, brought to a detoxification center and then released to naval authorities. Two days later, he was evaluated by a medical officer who noted that Petitioner was "under (increased life stress (secondary) to work environment and impending PCS (permanent change-of-station) move to Pearl Harbor." Petitioner's request for antabuse was granted and counseling was recommended.

h. Petitioner then reported for duty aboard USS JASON (AR-8), where he continued his record of excellent service. He received a certificate of commendation and a letter of appreciation and reenlisted in December 1990. Medical record entries of May, August and September 1989 indicate that he requested and received prescriptions for antabuse. The May 1989 prescription apparently resulted from an incident in which he consumed a "12 pack of beer over 12 hours, was found asleep in the crew's lounge the next day, and was told to 'hit the rack' by the supply officer." A similar entry of 31 January 1990 stated as follows concerning his state of mind and the treatment prescribed:

> (Petitioner) recently had wife walk out on him and the children. He feels tremendous stress and wishes to be back on Antabuse, which he takes himself. He is also concerned because he feels he needs to be active in AA (at) this pt in his life but he is not getting support from his dept who feel he should attend meetings on his own time (pt has no transportation as his wife has taken car.) . . . His mood: "sometimes feel like my world is falling apart." . . .

Antabuse was once more prescribed on 31 March 1990, but Petitioner did not need the drug again until 30 September 1991. The entry of the latter date indicates that Petitioner "desires to take antabuse in effort to stop drinking. Patient currently under a lot of stress, especially from pending divorce. Drank heavily last night until 3AM and did not report to work until 1500." This entry concludes "consider refresher course at ARC." Meanwhile, Petitioner was advanced to MSC on 16 February 1991. The record also indicates that JASON deployed to Southwest Asia in support of Operation Desert Shield/Storm.

i. In November 1991 Petitioner was transferred to Naval Station (NAVSTA), Long Beach, CA, where he continued to serve in an exemplary manner until 4 September 1992, when he was hospitalized after being found drunk on duty. At that time, a breathalyzer showed a blood alcohol level of .27%, and Petitioner

admitted to drinking six or seven beers at lunch. A consultation report on the following day diagnosed him as alcohol dependent and noted the prior Level III treatment in 1985.

j. Subsequently, Petitioner was charged with being drunk on duty on 4 September 1992, drunk and disorderly conduct on 2 and 4 September 1992, and indecent assault on a junior enlisted female on 2 September 1992, in violation of Articles 112 and 134 of the Uniform Code of Military Justice (UCMJ). Those charges were referred to a special court-martial that met on 5 and 25 November 1992. In accordance with a pretrial agreement, Petitioner pled guilty to these charges and specifications. During the military judge's inquiry into the providence of his plea, Petitioner testified, in part, as follows concerning the offenses:

> . . . On 4 September 1992 I was on duty in building 422. I did assume the duty on that day as building manager insuring the building is clean and maintenance is being done. I was found drunk while performing my duties, I had an alcohol blackout. All I remember is getting into a . . . police car being taken to the hospital. I don't remember anything before that, except for getting up in the morning drinking more beer. I had been drinking from about the 31st of August, I was on an alcohol venge (sic). I started drinking (and) I lost control . . .
>
> . . . I was drunk and disorderly (on 2 September 1992). I was in building 422 as the building manager. I don't remember anything but I saw the police report, it stated I was drunk and disorderly by acting unprofessional, talking loud, and acting like I was intoxicated. Two people that were witnesses indicated that I was loud and touching people in an inappropriate manner by grabbing them. I do believe that the police report was accurate and true . . . I was not apprehended on that day, there was no blood alcohol test done . . .
>
> . . . I was apprehended on the 4th of September over in the BEQ (bachelor enlisted quarters), and then taken to the police station onboard (the NAVSTA), while there I was loud and intoxicated, I was yelling at the police and being disorderly . . .
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> . . .(On 2 September 1992) I did grab SKSN (Ca) by her wrist, pull her down and kiss her, with the intent to gratify my sexual desires . . . IN her report she indicated that at the time I smelled like alcohol and was under the influence. I told her to call me by my first name, and I was telling her she needed a real man . . . All of this took place in my room, I had invited her up.

Petitioner also acknowledged that despite his drunken condition, he was responsible for his actions. The military judge then

found that Petitioner's plea was knowing and provident, and found him guilty.

k. During the sentencing hearing [redacted] a licensed family and child counselor working as a family advocacy specialist at the local family service center, testified on Petitioner's behalf. She stated that he had been undergoing treatment since 4 September 1992, and opined that Petitioner did black out on 2 and 4 September 1992. She further stated that Petitioner should go back to Level III treatment at ARC. She also testified that Petitioner "suffers from post traumatic stress from his Vietnam experience, and "I would also like to see him attend the veterans center in Anaheim, they have a post traumatic stress group for Desert Storm (and) Vietnam vets." She later testified that "there is nothing about the post traumatic stress disorder (PTSD) that would hinder (him) from continuing with his career . . . Operation Desert Storm triggered a lot of his old Vietnam problems."

l. After several other individuals testified on his behalf, Petitioner made an unsworn statement, in part, as follows:

> . . . My wife was ill at the time we deployed for Desert Storm and I have two step children. I was ordered to go back to war, which I was proud to do. We got off into Desert Storm, Desert Shield. I am trying to get my people (to) put on their gas mask and do my job as a chief petty officer on a ship 18 and 19 hours a day. Mail was slow in coming, about 18 days had gone by and I didn't have any mail. I went and asked the XO if he could get a hold of the ombudsman to check on my wife to see if she was okay. About four days after that I was called back to the XO's cabin with the chaplain, I thought there might have been a death or something. They said as far as we understand you wife took off with a white male, your son was committed to a hospital, and from that point on, I was in depression. For two months prior to us returning to San Diego, I really didn't know if my wife and kids would be on the pier or not. When we arrived they weren't there, not to use this as an excuse but the feelings came back, and the negative attitude and the depression when I returned as Marine from Vietnam and being spit on, and called a baby killer, no hero welcome again two times in my military career, depressed me.

Petitioner then expressed remorse for his actions, stating that "this is killing me," and "I do want to stay in the Navy, I would do anything possible to rectify this."

m. The military judge could legally have sentenced Petitioner to a bad conduct discharge (BCD), forfeitures of 2/3 pay per month for six months, reduction to seaman recruit (SR; E-1), and confinement at hard labor for six months. However, the

judge sentenced him only to confinement for 60 days and a reduction in rate to MS1. After announcing sentence, the judge recommended that if Petitioner was eligible for Level III treatment and successfully completed it, the period of confinement be suspended for one year. Subsequently, in accordance with the terms of the pretrial agreement, the convening authority, the CO of NAVSTA Long Beach, mitigated the confinement to restriction and suspended the reduction for 12 months.

n. On 27 January 1993 Petitioner's command reported the results of Petitioner's court-martial to the Bureau of Naval Personnel (BUPERS). On 2 March 1993 BUPERS directed that he be processed for separation by reason of misconduct due to commission of a serious offense. An administrative discharge board (ADB) met on 5 April 1993 and, after considering favorable documentary and testimonial evidence, found misconduct as alleged but recommended Petitioner's retention in the Navy. The CO concurred with this recommendation and BUPERS directed retention. On 25 May 1993, Petitioner signed a service record entry acknowledging that further deficiencies in his performance or conduct could result in disciplinary and/or administrative separation action. On 6 April 1994 Petitioner reenlisted for three years. In October 1994, he was reassigned to USS SAMUEL GOMPERS (AD-37). Upon detachment from NAVSTA Long Beach, Petitioner received the Navy Achievement Medal for his outstanding performance of duty from January 1992 to September 1994.

o. Petitioner then continued his record of excellent performance. However, a medical record entry of 13 January 1995 reflects that he sustained a slight injury while intoxicated on a liberty boat. The entry indicates that he had consumed six beers and four shots of liquor. Entries of 10 and 11 April 1995 reflect a similar incident while on liberty in Thailand. The medical officer opined that Petitioner's insight into his problem was poor and he "appears to be in denial that he has a problem with (alcohol) at this time," and "much of his problem may be related to PTSD from Vietnam era." The entry concludes by stating that upon return to port, Petitioner should be referred to a mental health center "for eval of PTSD."

p. In October 1995 [redacted] was decommissioned in Norfolk, VA. On 27 October 1995 Petitioner boarded a commercial airliner that would take him to the west coast and a new command. While on board, he committed offenses that resulted in a second special court-martial. The facts and circumstances surrounding those offenses are set forth in the confessional stipulation of fact introduced at that court-martial which reads, in part, as follows:

> (Petitioner) arrived at Norfolk International Airport at approximately 1345 (on 27 October 1995). He joined several chief Petty Officers at the airport bar at approximately

1430 and began drinking shortly thereafter. Over the next few hours, several former GOMPERS crewmembers gathered at or near a long table in the airport bar . . .

By the time (Petitioner) boarded American Airlines flight #701 at approximately 1830, he had consumed at least two bottles of beer and four or five double rum and cokes.

When (Petitioner) left the bar, he was visibly intoxicated and was having some trouble walking steadily. MM3 (machinists mate third class) (Michelle H) held his arm as they walked to the boarding area.

(Petitioner) and others from GOMPERS boarded (the airplane). (He) proceeded to seat 25D (an aisle seat). He was drunk, loud and boisterous, but not unruly or belligerent.

Shortly after taking his seat, (Petitioner) began talking to IC3 (interior communications technician third class) Angela (S), who was seated next to him in seat 25E (a middle seat). IC3 (S) soon moved one seat to her right, seat 25F, a window seat. After she moved to seat 25F, (Petitioner) reached across seat 25E, grabbed her waistband, and tugged with both hands and attempted to pull her back towards him. When he grabbed IC3 (S's) waistband, (Petitioner) put fingers of both hands inside her waistband . . . IC3 (S) indicated that the touching was offensive by resisting his pull and asking him to stop . . .

Shortly after Flight #701 departed . . ., the flight attendants began serving beverages. (Petitioner) purchased six small rum bottles and some cola . . .he drank three of the bottles within a short time after he had been served.

Shortly thereafter, MM3 (H) asked (Petitioner) to move up front to sit with her and SN (Krista G) in row seven. (Petitioner) agreed, walked to the front of the airplane without assistance, and sat down in seat 7D. SN (G) sat in seat 7A and MM3 (H) sat in seat 7B.

Approximately ten minutes after sitting in seat 7D, (Petitioner) became loud and used profanity, including the work "fuck." (Petitioner also threw a plastic mixed drink cup at the bulkhead in front of row 7. Individuals seated in seats 7E and 7F complained to a flight attendant about (Petitioner's) conduct and asked that (he) be moved. MM3 (H) switched seats with (Petitioner).

MM3 (H) purchased a bottle of champagne, which was shared between herself, SN (G) and (Petitioner). (He) also consumed additional mixed drinks.

(Petitioner) again became loud, and was cussing. A flight attendant told (him) that he would not be served any more alcoholic drinks. After being told he would not continue to be served alcohol, (Petitioner) threw a glass of champagne against the bulkhead in front of row 7. (Petitioner) also threw another glass of champagne on MM3 (H). MM3 (H) and SN (G) went aft in the airplane and told LCDR (lieutenant commander; O-4) (Ca) about (Petitioner's) conduct.

LCDR (Ca) walked forward and talked to (Petitioner). (Petitioner) said words to LCDR (Ca) to the effect of "Fuck you, are you trying to bust me?" LCDR (Ca) escorted (Petitioner) back to seat 25D. (LCDR Ca) then took a seat a few rows forward of row 25.

IC3 (S), laying on her side in a fetal-type position, was sleeping across seats 25E and 25F when (Petitioner) returned. Her back was against the seat backs, and her head was towards the window. Shortly after sitting down, (Petitioner) placed his hand between her thighs, one or two inches from her crotch . . . IC3 (S) indicated the touching was offensive by sitting up abruptly and loudly telling (Petitioner) words to the effect that he should keep his hands to himself . . .

Approximately ten minutes later, (Petitioner) placed his hand on IC3 (S's) left knee and slid it about five to six inches up her thigh . . . IC3 (S) indicated the touching was offensive by slapping his hand, yelling, and shoving him several times in the chest. After the last shove, (Petitioner) fell to the floor . . .

LCDR (Ca) approached IC3 (S) and asked if she was alright (sic). She did not respond. He then sat in seat 24B . . . (Petitioner) then stated to LCDR (Ca), "Fuck it" or "Fuck you." He also said "I don't care if you're a fucking officer," "I'm tired of these fucking Navy games," and "Kiss my ass." . . .

Sometime later, IC3 (S), in seat 25F, leaned against the window and fell asleep. She awoke when (Petitioner) patted her left breast with his hand . . . IC3 (S) indicated the touching was offensive by glaring angrily at (Petitioner) . . .

Approximately ten minutes later, (Petitioner) reached toward IC3 (S) and grabbed her left breast while saying "Honk." . . . IC3 (S) indicated the touching was offensive by shouting, standing up, grabbing (Petitioner) by the collar, and slapping his face . . .

At LCDR (Ca's) direction, ICC (interior communications chief petty officer) (P) and BM1 (boatswains mate first class) (F) escorted (Petitioner) in the Dallas, Texas

airport to the next leg of his flight, American Airlines flight #1769. ICC (P) and BM1 (F) escorted (Petitioner) directly to his seat.

Sometime during Flight #1769, (Petitioner) walked forward in the plane and sat next to IC3 (S), who was talking to LCDR (Ca). (Petitioner) placed his hand on IC3 (S's) knee . . . IC3 (S) indicated the touching was offensive by immediately brushing his hand away from her knee . . .

This incident resulted in extensive coverage in the national media. On 9 November 1995 the *Washington Post* printed an account of Petitioner's actions on page one. A follow-up story appeared in that newspaper on the following day and reported that as a result of this incident and others like it, the Chief of Naval Operations (CNO) had directed a one-day "stand down" in order to "take a hard look at ourselves."

q. After the incident, Petitioner was reassigned to the Transient Personnel Unit, San Diego, CA, awaiting disciplinary action. On 10 November 1995, at the command's request, he was evaluated by Captain (CAPT; O-6) Antonio F.C. Reyes, MC, USN. At that time, CAPT Reyes diagnosed Petitioner with chronic PTSD and provided several options for treatment. Documentation in the record indicates that Petitioner elected to continue his treatment with CAPT Reyes.

r. On 28 November 1995 Petitioner was charged with disrespect to LCDR Ca, disobedience, two incidents of assaulting IC3 S, four incidents of indecently assaulting her, and drunk and disorderly conduct, in violation of UCMJ Articles 89, 92 and 134. Petitioner was subsequently directed to undergo a sanity evaluation and the panel, consisting of two psychiatrists, submitted its extensive report on 7 January 1996. Both psychiatrists concluded that Petitioner suffered from PTSD at the time of his offenses, but the disorder did not render him unable to understand the nature of his actions. Accordingly, he was deemed competent to stand trial. On 20 December 1995 Petitioner was charged with an additional specification of indecently assaulting MM3 H in January 1995 aboard GOMPERS. Her uncontradicted testimony concerning this offense at a subsequent ADB reads, in part, as follows:

. . . I was working . . . in the galley and it was early in the morning. It was probably maybe 1:00 in the morning . . . I was prepping bacon for the morning time and standing at this table and just pulling off the strips of bacon and putting them on these big baking sheets . . . (Petitioner) came into the galley and he was wearing civilian clothes . . . As soon as he walked in, I noticed that he was very intoxicated . . . He came over and he started talking to me and he was standing very close to the right of me and . . . we were having a conversation. I was just very quick with him, and he was going on about his

wife and Vietnam, and he brought his rosary. So I talked about religion . . . It was approximately 15 minutes . . . Like I said, I was stripping bacon and he just reached up and grabbed my right breast, and I . . . stood there after the incident and I just . . . was in awe, because I didn't know what to do . . .

s. On 8 January and 26, 27 and 28 February 1996, Petitioner was tried by a military judge sitting as a special court-martial. He was represented at trial by Lieutenant (LT; O-3) H, a Navy judge advocate. After Petitioner entered mixed pleas of guilty, the judge convicted him of all the offenses except the specification alleging disobedience.

t. During the trial, several stipulations of expected testimony were received in evidence. Two such stipulations were received from a Master Chief Mess Management Specialist (MSCM; E-9) Rat, Petitioner's supervisor aboard SAMUEL GOMOERS. In one stipulation, MSCM Rat attested to Petitioner's honesty, reliability, character, bearing, and commitment to equal opportunity. In the second stipulation, MSCM Rat said that he was aware of Petitioner's alcohol problem, referred him to the drug and alcohol program advisor (DAPA), and would have recommended Petitioner for another Level III treatment had he been consulted. Retired Boatswains Mate First Class (BM1) M also submitted two stipulations. The first stipulation was in the nature of a character reference; attesting to Petitioner's honesty, reliability and military bearing. The second stipulation stated that Petitioner's alcohol problem was known to the command aboard SAMUEL GOMPERS. However, BM1 M stated that neither Petitioner nor anyone else with an alcohol problem received adequate support from the command, and BM1 M was rebuffed when he tried to get medical assistance for Petitioner when he was intoxicated. BM1 M then stated as follows:

> The GOMPERS was a troubled command with three COs in two years. Alcohol was a prominent part of the social structure, from the top down. Several officers were frequently inebriated during port calls and at command social events. On more than one occasion, I personally followed our very intoxicated CO to his stateroom to ensure that he arrived safely.
>
> In my 20 years, I have never seen a command where drinking was that prevalent, or where morale was that low.

In one of her two stipulations, a Religious Programmer First Class (RP1) D essentially provided a character reference similar to that provided by BM1 M regarding SAMUEL GOMPERS. She further stated that he "strongly backs the Navy's policies on equal opportunity and sexual harassment." In the other stipulation, she corroborated the statements of BM1 M. Electronics Technician First Class (ET1) W also stipulated to his testimony, and identified himself as the DAPA aboard GOMPERS. He said that he

became aware of Petitioner's alcohol problem, and told him that he should not be drinking. He further said that after the alcohol related incident in Thailand, the medical officer told him that Petitioner suffered from PTSD and by providing him with antabuse, the Navy "had been treating (Petitioner's) symptoms rather than the problem." ET1 W then stated as follows:

> I presented (Petitioner's) case to the (CO). A letter . . . was drafted documenting (Petitioner) as an alcohol rehabilitation failure. The letter notified (him) that this failure could result in separation from the military. Included with the letter was a plan to help get (him) back on his feet and start a new recovery program. That plan was to include a medical referral to the Oakland Naval Hospital. Also a possibility was return to an inpatient alcohol rehabilitation program. (Petitioner) was instructed to meet with me on a weekly basis, attend AA meetings, and was given a strong recommendation against further use of alcoholic beverages.
>
> To the best of my knowledge, (Petitioner) complied with the program. Upon return to the United States, he attended (AA) meetings on a regular basis. He met with me at least once a week, and, as far as I know, was not drinking. I do not believe the medical referral . . . was ever completed. (T)hat was a . . . referral which was to have (Petitioner) evaluated by a psychiatrist concerning matters related to (PTSD). I do know that (Petitioner) was neither sent for retraining at an inpatient alcohol rehabilitation facility nor sent for an alcohol dependency screening at a CAAC facility.

u. Several individuals also gave live testimony during the sentencing portion of the trial. Hull Technician Chief Petty Officer (HTC) V testified for the prosecution that he was one of the individuals who was sitting with Petitioner in the airport bar on 27 October 1995. He stated that he was aware of Petitioner's alcohol problem, and the efforts Petitioner was making to keep it under control. Specifically, Petitioner declined to attend a decommissioning party because he knew alcoholic beverages would be served. Further, he saw Petitioner at a reception on the day of the flight, and Petitioner did not appear to be intoxicated. However, when he saw Petitioner at the airport bar, Petitioner said to him "Ray, I'm on leave," and HTC V assumed this meant that Petitioner was going to drink, which he did. On cross-examination, HTC V stated that when Petitioner sat down, there were beers on the table and he took one.

v. [redacted] who had over 20 years of experience in Navy psychiatry and in treating PTSD, testified for the defense. He stated that PTSD is "my predominant interest in Navy psychiatry." CAPT Reyes then proceeded to explain PTSD as follows:

It's a syndrome known in a number of different ways over the years, that of battle fatigue, and so on and so forth, and only recently recognized as (PTSD). It's a conglomeration of signs and symptoms usually resulted (sic) upon severe trauma of one sort or another, such as being raped, such as being taken hostage, such as witnessing significant traumatic events, such as being a policeman or fireman and coming upon a scene of carnage, such as surviving the North Ridge earthquake or being a witness or surviving the Oklahoma Federal Building explosion recently or surviving the Beirut Airport explosion in 1983. So (PTSD) is a conglomeration of symptoms that otherwise normal individuals tend to develop when exposed to severe trauma.

When asked whether combat could be a precipitating trauma, [redacted] replied, "Indeed." He then went on to describe as follows the symptoms of PTSD:

. . . (F)irst you have to have the trauma and the trauma has to be sufficiently severe and extraordinary . . . Once that is established, the individual tends to demonstrate evidence of recalling the experience without wanting to, and we call these intrusive recollections. It will sometimes show up as nightmares with a content that is related to the trauma. It also sometimes surfaces as so-called flashbacks, where a person is here today, doing something, and then all of a sudden reexperiences a trauma as if it was actually happening . . . another set of symptoms is an effort on the part of the individual to avoid anything that reminds him or her of the trauma. So, for example, a person who has been in a fire will want to avoid fire . . . Avoidance behaviors are very typical.

The other set of symptoms is an autonomic response to people, situations or events that remind the person again of the trauma. So if a person . . . who has been severely physically abused or emotionally abused by his father as a child and comes to the Marine Corps Recruit Depot and, all of a sudden, starts to get yelled at by drill instructors and he starts to see his father. Before he even starts to see his father in the faces, he begins to feel very anxious, he can't sleep at night and so on and so forth. In other words, the body responds automatically, without the person wanting to, to anything that might remind him of the trauma . . .

There's another symptom called emotional numbing. This too, is quite common, in that the person who has experienced the trauma really cannot handle the emotions concomitant subsequent to that trauma, and so what they tend to do is to numb themselves and, therefore, they often cannot feel certain feelings that are related to the trauma. If the automatic unconscious numbing doesn't work,

they will often numb themselves extraneously by drinking alcohol or using drugs and, therefore, many of those folks tend to use alcohol or abuse drugs of one sort or another . . . (u)sually as a form of self medication. In other words, if one of the problems . . . is severe insomnia . . . (t)he reason they don't fall asleep at night is they subconsciously or unconsciously know they are going to have nightmares so they don't sleep. Now, if they need to wake up early the next morning what they try to do is numb themselves by drinking alcohol and getting drunk. The hope is that by getting drunk, they think it will prevent the nightmares and then be able to get up the next day and go to work.

[redacted] responded, "Yes indeed," when asked whether an individual engaged in such self-medication could become an alcoholic. Concerning the treatment of PTSD, CAPT Reyes testified as follows:

There are a number of treatments . . . My own experience, of the last 15 years of treating it informally, has been that (PTSD), if experienced by people who have experienced the same trauma is best treated in group therapy, and that is to say patients who have this diagnosis meet on a weekly basis and talk about their experiences, not only of the trauma itself, but of their signs and symptoms and the difficulties they are having in their lives. That, to me, is the standard, probably most effective treatment . . .

A most frequent form of treatment is a variety of medications. There is no single medication that is effective for (PTSD). What we use medications for is for symptomatic relief. For example, there are patents who become extremely anxious because of this condition, so we give them anti-anxiety medication. There are patients that because of the chronicity of their (PTSD) they become severely depressed . . . they then get treated with anti-depressant medication.

W. [redacted] then moved on to the specifics of Petitioner's case. He opined that Petitioner's experiences in Vietnam would have been sufficient to cause PTSD. He further pointed out that in 1985, when Petitioner first showed signs of a serious alcohol problem, he was undergoing training at FASOTRAGRUPAC in which the staff dressed in uniforms which bore a strong resemblance to those worn by the North Vietnamese Army. CAPT Reyes speculated that seeing servicemembers dressed in such a manner "aroused more nightmares and more intrusive recollections and more flashbacks and, therefore, aggravated his alcoholism." CAPT Reyes was critical of the treatment Petitioner received at ARC in 1985 because he was not referred for evaluation and treatment of PTSD. CAPT Reyes was personally aware that such treatment was being provided in the same building in which Petitioner was receiving treatment for alcoholism, and

he could have started to attend group meetings for PTSD as well. [redacted] then stated that the failure to diagnose Petitioner's PTSD at that time "could be construed as a form of negligence." He then testified that given medical record entries documenting a number of relapses starting in 1987, Petitioner should have received further Level III treatment or been evaluated for PTSD. He then said the chances of successfully combating Petitioner's alcohol problem without treating the PTSD were "not very good," and further stated that "treating the alcohol dependence without treating the (PTSD) is tantamount to giving a person with a headache aspirin not realizing that he has severe migraines or meningitis or (a) brain tumor . . . "

x. [redacted] also opined that the decommissioning of SAMUEL GOMPERS could have been a factor in Petitioner's decision to drink alcoholic beverages on 27 October 1995. [redacted] then stated that flying on any aircraft was also traumatic for Petitioner, based on an experience in Vietnam in which he was with other Marines in a helicopter and witnessed another helicopter being victimized by a booby trap in a "hot" landing zone.

y. [redacted] then described as follows the difficulties confronting individuals with PTSD:

> . . . They have difficulty concentrating because they are fatigued. They have difficulty with their relationships because their relationships don't work. So they get divorced a lot. They have difficulty with their superiors because, particularly with Vietnam veterans, they tend to distrust people in authority, and with good reason. It's not entirely unfounded that, in effect, the government betrayed them in many ways. They were betrayed by their own people. They would come back from combat and be depicted as child killers, spat on, so that they could not easily dress in their uniforms when they came back. That's betrayal. And so life becomes a continuous nightmare. It's hell.

LT H then asked whether the Navy properly handled Petitioner's case and [redacted] replied, "Navy medicine has handled it extremely poorly."

z. On cross-examination, [redacted] acknowledged that even Petitioner's PTSD would not have prevented "the management of alcoholism," and that successful treatment of PTSD is no guarantee that an alcohol problem can be overcome. He also admitted that he was unaware that Petitioner was in the airport bar more than five hours before his flight was due to take off. When questioned by the military judge, [redacted] criticized the way Navy line officers handled Petitioner's case, based on his assumption that the medical officers would have informed the chain of command informed about Petitioner's problem. [redacted] also criticized the prescriptions for antabuse, stating that the

drug "was just a total waste of time and its no longer used, as far as I know, by most people who are reasonably knowledgeable . . ." He further said that the most effective treatment for alcohol dependence "is a well worked 12-step program." [redacted] said he could not understand why JASON did not support Petitioner's need for AA meetings, but also admitted that he had no personal knowledge whether or not Petitioner received such support. The military judge then pointed out an apparent contradiction in [redacted] testimony on direct examination in that he stated that individuals with PTSD have difficulty getting close to others, but also said that Petitioner was very close to his shipmates and had difficulty leaving them. [redacted] attempted to resolve this apparent inconsistency as follows:

> . . .(I)t does sound paradoxical but, . . . (Petitioner) has spent all of his life being a co-dependent . . . (B)eing a co-dependent suggests that a person has had, in their family, a parent, . . . or a wife or a husband who is alcohol dependent and the co-dependent tends to enable that person's behavior that doesn't help that person recover.

CAPT Reyes then stated that undiagnosed and untreated PTSD may have a significant and negative impact on an individual's ability to follow a 12-step program.

aa. The record also indicates that the former executive officer of SAMUEL GOMPERS, LCDR L, testified on Petitioner's behalf. Although his testimony is not contained in the material furnished the Board, it is clear from the record that he attested to Petitioner's superb performance of duty while on board that ship. Petitioner then made an unsworn statement to the court in which he admitted that the Level III treatment he underwent in 1985 had been helpful. However, he also said that it was unsuccessful because "they wouldn't let me talk about my Vietnam experience, which was still bothering me . . . (and) every time I brought it up, they told me it wasn't an issue." He further stated that Desert Storm was "a low point" for him because the scud missile alerts "got me thinking about NAM and created a great deal of stress." He also stated that after the 1992 court-martial "I desperately wanted help and the judge recommended that I receive Level III treatment, but I never received it." He also corroborated the testimony of ET1 W. Petitioner then acknowledged that he "never should have gone into the airport bar on October 27th," but he wanted to be with his fellow chief petty officers. He also said that another chief gave him a beer and he started drinking again but "no one forced me to do it, though, I know better than that now." Petitioner then apologized for his behavior, specifically to MM3 H and IC3 S. He also said that he was going to five AA meetings per week and seeing [redacted] "who has been a tremendous help to me."

bb. After all evidence had been received during the sentencing phase of the trial, the military judge recessed the proceedings overnight to deliberate on an appropriate sentence.

On the following morning, the judge called the court to order and stated as follows:

> This is an extremely difficult case in which to determine an appropriate sentence. On the one hand, the criminal behavior of the accused discredited the naval service, directly undermined good order and discipline and violated the physical and emotional sanctity of two women shipmates.
>
> On the other hand, the accused is a veteran of more than 18 years of service, during which he shed blood for his country, served in two wars and willingly gave his absolutely best, tireless effort on the job.
>
> In short, this case involves a 4.0 chief petty officer who has provided exemplary, courageous service to his country, but who, like many heroes in Greek tragedies, suffers a fatal flaw. (Petitioner) is an alcoholic who sometimes behaves deplorably when intoxicated.
>
> There has been much testimony about who is to blame for not diagnosing and treating (Petitioner's) (PTSD) and alcoholism in a timely manner. Maybe someone in Navy medicine should have intervened effectively sooner than occurred in this case. Maybe the CO and XO of the USS GOMPERS should have arranged for Level III alcohol rehabilitation for (Petitioner) upon return to Alameda instead of considering him indispensable to the preparations for decommissioning USS GOMPERS.
>
> Things could have been done differently to assist (Petitioner) in dealing with his problems. Certainly, there is always room for improvement in what we, in the Navy, do to help our people. However, (Petitioner) had already been through Level III alcohol rehabilitation and it obviously failed. It is not the Navy's fault that (Petitioner) failed to internalize the lessons of that program, continued to drink, and violated the UCMJ.
>
> Navy leaders care for and take care of their people. That is one of their primary responsibilities. Sometimes leaders make decisions with the best of intentions but in hindsight realize that more harm than good is done as a result . . .
>
> (Petitioner's) superiors . . . acted with his best interests at heart but, in hindsight, may have done more harm than good. (Petitioner) is, and has always been, a tremendous worker. In the words of (LCDR L), he is a superstar. In an ironic sense, he is a victim of his own success. If the Navy bears any fault in this case, it is in overlooking (Petitioner's) drinking problem and occasional behavioral problems because he was such a tremendous worker. However, there is only one person who is responsible for the criminal behavior in this case, and

that is (Petitioner). (He) knows that better than anyone in this courtroom.

I am convinced that (Petitioner) also knows that our Navy does not glamorize or promote the use of alcohol. There are, to be sure, zealots who would blame everything on alcohol and blame the Navy for every crime committed by someone under the influence of alcohol. (Petitioner), and anyone who truly knows and understands my Navy, knows that is not true . . .

. . . (Petitioner) does not blame the Navy for his actions. He accepts responsibility for what he did. They were his actions. He chose to drink, and he chose to engage in the behavior he engaged in after becoming intoxicated. That does not mean that his alcoholism and state of intoxication when the offenses were committed should not be considered in fashioning an appropriate sentence. They are extenuating circumstances.

So what is an appropriate sentence in a case such as this? Perhaps there are some who would like to see (Petitioner) receive at or near the maximum sentence in this case. I could do that; I could cut him off at the knees, but I won't. That would not be a just sentence.

Unlike my civilian brethren, I do not have the power to suspend any portion of my sentence. I can only recommend suspension. It is up to the convening authority to accept or reject my recommendation in that regard. Accordingly, I cannot adjudge a bad conduct discharge (BCD) and then suspend it conditioned upon successful completion of an alcohol rehabilitation program and aftercare program. If I could do so, I would. But I will not adjudge an unsuspended (BCD) to a servicemember who has shed blood for his country and who is still haunted by the ghosts of Vietnam for committing indecent assaults of this nature.

I in no way intend to minimize the criminal nature of the accused's actions in this case. But there were no physical injuries suffered by any of the victims . . ., and there is no evidence of any lasting psychological trauma.

The military judge could have sentenced Petitioner to a BCD, confinement at hard labor for six months, forfeitures of 2/3 pay per month for six months, and reduction to SR. However, the judge's sentence was confinement at hard labor for 90 days, a reduction in rate from MSC to MS2, and forfeitures of $500 (out of a possible $1100) pay per month for six months. However, in accordance with a pretrial agreement, the convening authority was required to suspend all confinement in excess of 89 days, and the reduction in rate below MS1.

cc. On 8 March 1996 the incident of 27 October 1995 and the ensuing court-martial were the subject of a segment on the television program "20/20." The segment consisted largely of an on-camera interview with IC3 S, who related her version of the events on that day. During the interview, the commentator referred to "a flight from hell," and called the special court-martial a "show trial." At the end of the piece, the moderator opined that "even after Tailhook, the Navy simply doesn't get it."

dd. On 12 March 1996 the CO of the brig in which Petitioner was serving his sentence to confinement initiated administrative separation action by reason of misconduct due to commission of a serious offense as evidenced by the most recent court-martial conviction, and by reason of his "Level III Alcohol/Drug Abuse Rehabilitation Failure." Petitioner was advised that if separation was approved, characterization could be under other than honorable conditions. Two days later, he elected to present his case to an ADB. On 14 March 1996 the CO notified defense counsel, LT H, that the ADB had been tentatively scheduled for 20 March 1996. One day later, LT H requested that the ADB be delayed until "the first week in April, preferably the 4th or 5th." In support of that request, LT H stated that he was representing another chief petty officer at a court-martial beginning on 22 March 1996, and all of his time until then would be taken up with trial preparation. Counsel also opined that administrative separation action should not have been initiated until after convening authority action on Petitioner's court-martial. On 18 March 1996 the CO notified LT H that the ADB would be held on 29 March 1996. Also on 18 March 1996, the convening authority took action on the special court-martial by approving the sentence but partially suspending the confinement and reduction in accordance with the pretrial agreement. Additionally, on that date the CO requested that IC3 S and MM3 H be made available to testify at the ADB. On 20 March 1996 the CO appointed a three-member ADB to consider Petitioner's case and formally appointed LT H as Petitioner's counsel. On 21 March 1996 LT H submitted a request that [redacted], BM1 M, RP1 D, LCDR L and MSCM Rat be made available as witnesses for Petitioner at the ADB.

ee. On Wednesday, 27 March 1996 LT H requested a further delay in the ADB until 3 April 1996. In his request, he pointed out that his trial had not yet been completed since the members were deliberating on findings and would continue to do so on the following day. Accordingly, LT H noted that "I will be in court tomorrow at least most of the morning and, should a sentencing case become necessary, most or all of the day. This will not give me time to prepare for the (ADB)." LT H also noted that he had long standing medical appointments on 1 and 2 April 1996 but if a postponement to 3 April 1996 was not possible "I will fight . . . to move the date of the procedures in order to accommodate your command." On 28 March 1996, the brig CO denied LT H's request, stating that "(y)our (CO) assures me you have been

provided adequate time to prepare for this case, particularly in view of the fact you represented (Petitioner) during the court-martial proceedings."

ff. Petitioner's ADB met on Friday, 29 March 1996. After the senior member of the ADB advised Petitioner of his procedural rights, LT H stated as follows:

> We are not in any way prepared to go today. This is an issue I brought up with the (CO) of the brig. I have been in a contested members' trial every day since last Friday. I got out last night about 7:30. I stayed up until two this morning, getting everything together I could for this (ADB). I haven't had an opportunity to talk to many of the witnesses and I am not prepared to go forward today . . . This is not a last minute thing. I relayed my concerns about this to the (CO) a couple of weeks ago. I relayed that concern again Wednesday night when it became clear that my trial was going to spill into Thursday.

When questioned by the senior member, LT H acknowledged that although he had served as Petitioner's counsel during the court-martial, the government intended to call witnesses who did not appear at trial, and he had not been able to talk with them. Further, he had not been able to interview some defense witnesses. When the senior member asked if LT H could be ready by Monday, 1 April 1996, counsel replied, "I would hope so," and even held out the possibility that he could be ready by Saturday or Sunday. Counsel emphasized that "it's not about my personal convenience (but) . . . my ability to prepare." Despite the foregoing, the senior member said, "I would like to try and proceed as much as we can."

gg. Both the recorder and LT H were then given an opportunity to question each member of the ADB to determine if grounds existed for a challenge for cause. When the recorder asked the senior member whether she had received any direction from superiors concerning the desired outcome of the ADB, she answered "No." She replied "Yes," when asked whether she could consider the evidence and come to her own decision as to the proper disposition of the case. She indicated that the stand down ordered by CNO would not make her look at this incident as more serious than any other incidents, and she had no prejudice against Petitioner because of the stand down. The senior member said she had not seen the 20/20 segment and had not heard any reports about it. When asked whether she could "separate whatever the press might say about the outcome of this (ADB) and simply make a decision on what you feel is right based on the evidence, she said "Yes, sir." The second member also denied that anyone had tried to influence him about the case. He said that he had read press reports of the incident at issue, but had not seen the 20/20 segment and "was not aware of it." When asked whether he could make a just determination based on what he thought was right and not on the opinions of others, he said,

"I'll do just that." The third member denied receiving any direction from others about a desired result of the ADB. He said he had read some reports of the 27 October 1995 incident. He had not seen the 20/20 segment, but was aware of it. He said he would keep an open mind and make a decision that was fair and just, and not based on what someone else might think is right. LT H was then given an opportunity to question the members. After stating once again that he had been unable to prepare and would have to "wing it," he asked them if they had any concerns about their reputations if they voted to retain Petitioner in the Navy. All members said they had no such concerns. When LT H asked one member about PTSD, the member stated as follows:

> I believe it exists. I (also) believe . . . too many people have tried to use it as an excuse in areas where it really doesn't belong . . . It was originally diagnosed as being related to combat-type situations and I think people . . . have tried to make it apply to things we commonly go through in . . . everyday life.

Based on their questioning, neither the recorder nor LT H challenged any member of the ADB for cause.

hh. The recorder then introduced documentary evidence for the ADB's consideration. Among the exhibits admitted in evidence was a statement from a retired MSCM Ram, who served as Petitioner's supervisor in 1991, when they were assigned to NAVSTA Long Beach. MSCM Ram stated that after Petitioner reported for duty, he received reports that Petitioner was trying to borrow money from junior enlisted Sailors who worked for him, but Petitioner denied the allegation and no formal complaint was made. MSCM Ram also said that on another occasion, Petitioner asked him for a loan, but he refused. There were also reports that Petitioner was drinking on duty. MSCM Ram concluded his statement as follows:

> I strongly believed that (Petitioner) failed to effectively and wisely use the many opportunities given him. Through fault of his own, all the assistance, counseling and treatment produced no fruitful results. In my honest opinion, (Petitioner) **should have been discharged a long time ago.** (emphasis in text)

A retired Commander (CDR; O-5) T, the XO of NAVSTA Long Beach from April 1990 to February 1993, submitted a statement that reads, in part, as follows concerning the actions of the command after the 1992 court-martial:

> . . . I am certain that (Petitioner) would have received a CAAC screening and possibly a screening appointment at the Alcohol Rehabilitation Unit at the Long Beach Naval Hospital. I also remember that it was not unusual that these evaluations and screenings did not result in assignment to a Level III inpatient program, especially in

the case of a sailor who had already received Level III and was evaluated as possessing the tools to deal with their alcohol abuse. These sailors were frequently directed to participate in an AA chapter and their attendance was monitored. Additionally, many were further medically evaluated and placed on antabuse in connection with AA.

I do remember that I had a conversation with (Petitioner) . . . where (he) recognized the seriousness of the incident on his career. He was contrite and was fully aware that in his capacity as a chief Petty Officer he was responsible for his actions resulting from his alcohol abuse. I had no doubt that he knew that alcohol made him loose (sic) control and that his decision to use alcohol was a decision that he was fully responsible for. I was left with the feeling that he was willing to do whatever was necessary to control his abuse problem and remain on active duty.

CDR T's successor as XO, CDR S, stated, in part, as follows:

I do not clearly recall discussions and outcome of any Level III program for (Petitioner). From my experience as XO . . . just previous to coming to (NAVSTA Long Beach), I knew that both the CAAC director . . . and the Long Beach Naval Hospital . . . were very cautious about granting repeat (ARC) quotas to Level III failures.

I recall being impressed by (Petitioner) in that he was very candid about his alcoholism and his past problems, that he knew he couldn't drink, that he knew that regular attendance at AA meetings was crucial to continued sobriety, that he was grateful for the second chance, that he loved the Navy and knew he couldn't afford to screw up again. To my knowledge, during my time as XO, (he) did not have any alcohol related incidents (I would have hammered him), though I cannot attest to his sobriety . . .

I also made use of (Petitioner) as a counseling asset for sailors who had experienced an alcohol-related incident, as augmentation for the mandatory DAPA visit. (Petitioner) used his mistakes as an alcoholic, the price he had paid for his drinking and the importance of recognizing the consequences of choosing to abuse alcohol as talking points with these sailors. (Petitioner) lived every day at (NAVSTA Long Beach) aware of those consequences for him personally should he have another alcohol-related experience.

My impression of (Petitioner) was that he was a very tightly wound individual, totally focused on running a good galley and trying not to drink, which for him, I think, was a moment-to-moment battle. He tried so hard on the job, because I believe he knew good performance was his only chance at staying in the Navy . . . I read of this last

> incident with great sadness, and though it seems harsh, I believe the only thing that will make (Petitioner) stop drinking is the loss of something he loves dearly--the Navy.

ii. LCDR L, the former XO of SAMUEL GOMPERS was permitted to testify out of order for the defense due to operational commitments. He stated that Petitioner came to SAMUEL GOMPERS just prior to her last deployment. LCDR L testified that as a tender, the ship was responsible for messing not only its crew, but also the crews of any ships being tended. He also testified that until Petitioner reported aboard, he thought the ship would be unable to perform this mission due to the detachment for cause of two successive food service officers and the lack of any chief petty officers in any of the ship's four messes. Petitioner not only performed superbly in his senior enlisted billet, but "was operating as de facto food service officer for a period of time," since yet another food service officer was detached due to stress. Improvement in the food and menu planning were noted. LCDR L then testified that there were several alcohol related incidents on this deployment, but no formal action was taken because on each occasion, Petitioner surrendered his identification card and stayed on board ship for the remainder of the time in that port. LCDR L said no consideration was given to giving him some sort of care because he "had been through a program once before." LCDR L then stated that "I talked with my DAPA on a daily basis," and clarified that the treatment that the DAPA wanted for Petitioner was not alcohol treatment but "medical treatment for trying to resolve why he mentally had problems . . . the stress related to his Vietnam experience." However, LCDR L acknowledged that Petitioner never received this treatment and explained this failure as follows:

> . . . We returned from deployment (and) stood down for 30 days and then we had another 60 days to get ready to take a ship with only half the crew on another 35-day around the horn trip to decommission the ship . . . Now I am in trouble because I have to take a ship, sail it, not tow it, sail it through the Panama Canal to get to Norfolk and then get it decommissioned once it arrives there in less than 30 days. I've got to feed a crew. I've got to do everything else . . . We worked really hard in trying to get everything done we could before we left and we were working some 12, 16 hour days, trying to get everything done . . . So we kept (Petitioner) at it and (he) stayed at it. We didn't have any alcohol incidents, by the way, in between (the) return from deployment and all the way through the (decommissioning) process. So there was four, five months where we had no problem at all.

LCDR L then stated that Petitioner performed in an outstanding manner during the decommissioning process in that he had to prepare about 60 spaces for inspection, and all of them "passed on the first pass."

jj. On cross-examination, LCDR L went over Petitioner's alcohol related incidents that occurred on the deployment. Such incidents occurred at Hong Kong; Phuket, Thailand; and Bali. In all of these incidents, Petitioner got drunk ashore while on liberty and was returned to the ship. LCDR L testified that he was aware that separation action could have been taken due to alcohol rehabilitation failure, but no such action was taken because the incidents did not affect his duty performance. He also stated that appropriate action would have been taken had he known of the assault on MM3 H. The recorder also brought out that Petitioner never complained about the programs run by the DAPA aboard ship. Concerning the failure to send Petitioner for the consultation recommended by the medical officer, LCDR L acknowledged that "we blew it," but also said this failure was due to oversight and not to any desire to prevent him from receiving needed treatment. LCDR L then said that he believed Petitioner could still provide useful service to the Navy, given his exceptional loyalty and skills, and since the mess management career field was undermanned. LCDR L further testified that Petitioner had been sufficiently punished given the nature of his offenses, the two courts-martial sentences and the fact that he would have to retire as an MS1 and not as an MSC.

kk. [redacted] A then testified over the telephone for the government over the objection of LT H, who stated that he had not had an opportunity to speak to her. ET2 A testified that while she and Petitioner were on a liberty boat returning to SAMUEL GOMPERS from Hong Kong, he rubbed her leg, patted her arm and made obscene comments to her. She did not report the incident "because he was a drunk." She said Petitioner should not be in the Navy because ""he's had repeated incidents . . . and he's not learning anything from it." When asked what the command did to deglamorize alcohol, ET2 A said that "other than putting out the standard information, don't drink and drive, it was pretty lax."

ll. After a lunch break, two other individuals testified for the government. CAPT J, the CO of NAVSTA Long Beach from July 1992 to September 1994, then testified telephonically for the government. He said that to the best of his recollection, Petitioner went to DAPA and Level III treatment after the incident that resulted in the 1992 court-martial. CAPT J also said that after the incident, Petitioner would talk to Sailors about the dangers of drinking and put some pressure on the younger Sailors not to do so. CAPT J said he based his recommendation for retention on Petitioner's "flawless performance." He had no problems with Petitioner after the court-martial. CAPT J also said that in his opinion, the Navy did all it could to help Petitioner. When asked by the senior member whether Petitioner should be retained, CAPT J said, "based on the second incident, to be completely frank with you, no ma'am." He also testified that he worked "very hard" to deglamorize alcohol at the command. He also said that he would not have hesitated to take disciplinary action and initiate

separation processing had Petitioner been involved in another incident at his command. Upon questioning by LT H, CAPT J said that the Navy had done all it should have done for Petitioner, but not all that could have been done. When told that Petitioner had not returned to Level III in 1992 or at any time thereafter, CAPT J said, "I was not aware of that. I was told he was going to Level III and he subsequently went somewhere and . . . when he came back he was a really squared away guy." CDR S then testified telephonically for the government, but said little more than what was in her written statement of 20 March 1996.

mm. Due to a fire, the ADB then recessed and did not reconvene until Monday, 1 April 1996. Upon reconvening, Ms. Joanne K, the family counselor who testified at the 1992 court-martial, testified telephonically for the government. She said that to her knowledge, Petitioner stayed sober from September through November of that year, but then stopped coming to her for treatment. She also said that she provided him with a point of contact at the veterans center, gave him the phone number and encouraged him to "go over there" for assistance with PTSD. When asked by the recorder whether Petitioner ever indicated that it was "absolutely impossible" for him to do so, she answered "No." She also testified that Petitioner never indicated to her that he thought he was not receiving sufficient treatment. However, on cross-examination, she admitted that he might not know whether the treatment he was receiving was adequate.

nn. [redacted] then testified telephonically for the government. [redacted] initially stated that she was a psychiatrist with more than 20 years of experience, with a specialty in addictions, specifically, alcohol addiction. She also said that she had been involved in running Level III programs for 19 years. After reviewing Petitioner's record, she opined that he should have been referred to some sort of formal treatment after the incidents in 1981. Concerning his 1985 Level III treatment and the failure to diagnose PTSD, [redacted] stated as follows:

> Whether he should have been diagnosed officially as having (PTSD) at the time of that inpatient hospitalization, I'm not going to hazard a guess on. I think it is fair to say from the narrative summary that the physician spoke with him, seemed to recognize that there were post-traumatic stress issues and made what, again, on the surface seems to be an appropriate recommendation that he go to the vet center to receive focused specialized one-on-one and group counseling for his PTSD issues.

Concerning the appropriate response to the relapses which began in 1987, [redacted] stated as follows:

> . . . (W)e'll start with the September 1987 incident. That would have put us in an OPNAV (Chief of Naval Operations) instruction prior to the one we are currently under, which

kicked in , I think, in September of 1990. So we were with (OPNAV Instruction [OPNAVINST] 5350.4. At that point, higher authority instructions and directives were fairly clear. They delineated a time frame for determining Level III failure as that point that was considered the formalized after-care period, and formalized after-care for Level III in the mid-1980's was either six months or one year . . .

. . .(T)he current NAVMILPERSMAN (Naval Military Personnel Manual) requirements for any incident at any point in time ends an individual's career after Level II or III, defining failure, was not in effect then. That came into effect in mid-1994.

So you had an incident in September of '87, which really could not be considered for processing in and of itself but which should have led the evaluator to look at the fact that the individual had "fallen off the wagon" and in addition to getting the individual on antabuse, should have referred him back into the official drug and alcohol chain for treatment . . . to get assistance in getting him back on the wagon.

It appears . . . that that did not happen, although it might have . . .

. . . You have a second incident after treatment, (a) medical incident, on the 23rd of May (1989) when (Petitioner) walks back in, describes drinking, requesting to be placed on antabuse. Again, there was a window of opportunity to look at getting the individual back into the treatment assistance system. It didn't happen. At least, from what I have in writing.

August of '89, you have sort of the breaking point in all of this. At that point in time, you have . . . an alcohol related incident of some type that's alluded to, you have a third alcohol-associated medical contact since a Level III program. At that point in time, from an administrative standpoint, if the rules and regulations in effect at that point were potentially to be brought into play, you had a third incident after treatment and the command could have stepped in with sufficient notification and processed or, at least, attempted to process (Petitioner) out of the service . . . (T)he same holds true for every incident after that, you put yourself in a situation where you have three or more incidents after a period of residential rehab which can . . . be used as a basis for processing for administrative discharge . . .

On the medical side of the house, for every incident that occurred that came to medical's attention, the evaluator had an opportunity to get (Petitioner) back into an

assistance based program, and I will share with you, ideally, in my opinion, what . . . really should have been.

What . . . should have been done was command supervised antabuse, not as number one on the list, but as part of a treatment program. It actually is in violation of the current antabuse instruction to just hand someone a prescription for antabuse, but antabuse could have been given on a command-supervised basis in conjunction with a return to command monitoring of 12-step meetings on a report card. Usually, the recommendation is three to five meetings per week, weekly follow-up with the Command DAPS, obtaining a home group, a sponsor, being able to give that home group name and the sponsor's name and phone number to the DAPA in case--sort of a check on the system needs to be made. In effect, what you would be doing is placing (Petitioner) back into a continuing care or after-care program.

In the face of prior concerns in the record about there being post-Vietnam issues, if, where (Petitioner) was stationed, there were (sic) a vet center or some type of specialized counseling available through mental health with people that had some extensive knowledge, skills and ability in dealing with PTSD issues, it would have been more than appropriate to have made a recommendation and monitor the individual getting into that type of outpatient support system and that could have happened anywhere along the line . . .

(T)hose are the kinds of things that should have happened all the way along the line with every successive alcohol-related contact.

oo. [redacted] then stated that the Navy was responsible for offering Petitioner the opportunity for formal treatment, but stated as follows concerning Petitioner's responsibility:

It is the servicemember's responsibility . . . to reach out and grasp the hand that is being offered and to take full advantage of what is being given, . . . it's the ultimate responsibility that really rests with the servicemember once offered and has been given an opportunity to get some help to put the tools that he has been given into a working ongoing program of recovery . . .

CAPT Gill evaluated the performance of Navy line and medical authorities and Petitioner as follows:

The line chains of command never, in my opinion, held the individual accountable and responsible. The medical folks did not do what they needed to do, in offering just an antabuse prescription and the individual, himself, has to take some responsibility. In not maintaining active,

ongoing attendance, using his phone list, having the quarter in his pocket, having the numbers to call if he felt like drinking, having those 0200 in the morning meetings at Denny's with the folks that he needed to talk with if he were (sic) beginning to white knuckle your (sic) fingernail stick. So, you know, everybody is responsible.

[redacted] then testified about the possibility of a second stint at Level III by stating that in her opinion "refresher rehab in, probably, 95 percent of the cases is not worth the piece of paper its written on," but did note that she was aware of individuals who had returned for "second, third, fourth, and sometimes fifth treatments."

pp. [redacted] then testified that when Petitioner went through Level III in 1985, such programs "in the main, did not have a cadre of staff that had any special knowledge, skills, abilities or expertise in either diagnosing and/or treating post traumatic stress." She then stated as follows:

> What would happen, if an individual brought up those kinds of issues in treatment or alluded to them, is we would be making a statement to the servicemember or we would be telling him, "This is not an issue that we can offer you any great help with here in this program; however, as part of your continuing care process, we will be making formal referrals . . . into some type if treatment continuum, and that could be a vet center, for example where you can go and be seen and get those issues dealt with. " . . .
>
> If you do not have staff actually in the programs and you are talking about taking somebody physically out of the program and sending them of your floor or off your ward or out of your facility to someplace else for evaluation or treatment while rehab is going on, sometimes it can have a very negative impact on the treatment process itself because most things that folks get in treatment are not repeated. A six-week program would have had six weeks set up so that each lecture was given once, each form was viewed once and that there was a six-week cycle of things that went on . . .

qq. The recorder pointed out to CAPT Gill that at the end of Level III treatment in 1985, the case summary stated that Petitioner planned to work on his Vietnam issues through a Veterans' Center, and she said that "certainly seemed to be appropriate." When her attention was directed to the 1992 recommendation of [redacted] that Petitioner attend another veterans' group, [redacted] stated as follows:

> Again, appropriate. I know that we, certainly, in Long Beach used the local vet groups on referral of folks that were diagnosed as having post-traumatic stress going through the Long Beach program and those types of groups

usually seem to work out quite well for folks. If they would get hooked up with those, go on a regular basis, really work on their programs. Work on their problem. Take the time to get involved, establish a good relationship with fellow group members and with the leader. We, certainly, saw some very good success coming out of those groups. They were . . . often run by recovering addicts or alcoholics who had extensive experience in dealing with PTSD issues, many of whom had been in Vietnam and who had run those programs for a number of years and we felt very comfortable with those referrals.

rr. On cross-examination, LT H pointed out that when Petitioner went through Level III in 1985, there was a PTSD Treatment facility in the same building, and asked why an individual would be sent "out-of-house," to a veterans' center, even if the referral was made after the alcohol program. CAPT Gill responded that such action would be appropriate if the out-of house facility was closer to the individual's command. She followed up by stating that "it would not be a matter of choosing against that program, but it would be a matter of looking at all of the things that were available." She further said that alcohol treatment facilities tend to be somewhat insular and isolated, and the staff at the ARC may have been unaware of the ongoing PTSD treatment in the same building.

ss. When questioned by the senior member of the ADB, CAPT Gill stated that 60% of servicemembers over 25 years old successfully complete alcohol rehabilitation, to the extent that they are on active duty, recommended for reenlistment and/or promotion, and have "gotten into no trouble." When asked whether Petitioner should be retained in the Navy, she replied as follows:

My recommendation in this case would be to separate. And it is my clinical recommendation. I have a feeling that if you had (Petitioner) evaluated by other folks that they might want to make a recommendation and getting back, re-involved in some sort of a treatment program . . . (M)y standard recommendation for anybody I see, whether senior enlisted or officers, has been to go by the current higher authority navy instructions and directives.

I support the OPNAV instruction where it says . . . three or more (incidents), after a period of treatment, can (be used) as a basis for separating. I strongly support the (MILPERSMAN) change that came out in 1994 which says any incident at anytime after Level II or Level III may be used as a basis for processing. I think in a treatment situation that we do not do the addict or alcoholic any good in giving them the threatening message and not holding them accountable and responsible.

That does not take away from the mistakes and errors that were made on both the side of Navy medical and Navy line, which I have already gone over . . . , but I think at this point in time that the chief needs to be discharged and that comes whether it's the chief, an E-1 or the O-6, and that would be my standard recommendations based on the history . . .

I think that at some point in time . . . if (Petitioner) is going to get on with the rest of his life, it needs to be with the understanding of truly realizing, not just intellectually, but at every level that alcohol is killing him and he needs to do something to deal with it.

It think what has preceded his (ADB) has allowed him, in effect, to continue to drink and continue to not do well . . . I guess my treatment philosophy is you need to hold the alcoholic accountable for his behavior. The OPNAV says that. The MILPERSMAN, in effect, says that . . . I don't see the system doing that up to this point in time. I would hope at some point, the system should. I don't think giving (Petitioner) one more chance in the face of multiple chances he has had prior to this is really going to chang e the ultimate outcome for the chief.

tt. [redacted] then testified as follows concerning her experience with individuals who had both alcohol and post-traumatic stress problems:

I do not put myself up to be a PTSD expert . . . But in the folks that I have dealt with that had PTSD, there are some, certainly, that drink to try to treat their (PTSD) symptoms and, in fact, you find that in the face of significant good abstinence, the unresolved significant (PTSD) symptoms with a reoccurrence of . . . the flashbacks, the nightmares in an, otherwise, sober situation can lead the individual to drinking. I have seen that happen. I actually have an individual in treatment that that happened to, where you have sober memories coming back that are triggered by . . . something and the guy falls off the wagon. I have seen other folks who . . . are able to handle their PTSD stuff okay, for lack of a better word . . . So it can happen both ways.

uu. MM3 H and IC3 S then testified for the government and recapitulated the events that resulted in Petitioner's recent special court-martial conviction. During her testimony, it was brought out that MM3 H had recently been through Level III treatment for alcoholism. During cross-examination, LT H attempted to impeach the credibility of IC3 S based on the fact that she appeared on 20/20 after initially stating that she wanted to remain anonymous.

vv. The recorder then rested his case, after introducing a memorandum form the local personnel support detachment to the effect that Petitioner's active duty service date was 13 January 1978, which meant that he had slightly more than 18 years of active service at the time of the ADB.

ww. LT H then introduced a considerable amount of documentary evidence, and most of it was admitted. This documentation included the character reference stipulations of RP1 D and BM1 M, and both stipulations of MSCM R. Also included in that documentation was a statement from a retired Signalman First Class (SM1) D, which reads, in part, as follows:

> I have visited (Petitioner) in order to acquaint him with the procedures he must go through when he eventually leaves the service and must deal with the Department of Veterans Affairs (DVA). I have provided him with the names of some therapists who are specialists in the treatment of (PTSD) and I have arranged to have an AA sponsor who is a Vietnam veteran.
>
> Having done these things, I would like to address some comments relevant to (Petitioner's) situation in relation to the possibility he may receive an administrative discharge from the naval service.
>
> The (ARC) at Balboa Naval Hospital (in 1985) failed to allow (Petitioner) access to [redacted] for treatment of PTSD while (Petitioner) was in rehab for his alcoholism. They knew (he) had . . .(PTSD) and stated as much in his final disposition statement. This was the policy of (ARC) in the eighties, to suppress PTSD and deal strictly with alcoholism. I know it for a fact because it happened to me in 1983. Had (Petitioner) been treated for PTSD then, it is possible that the incident that has brought him to his current state could have been avoided because it might never have happened. I have been in treatment for PTSD for thirteen years. I also have not drank in all that time. (Petitioner) was never afforded that type of treatment by the Navy even though it was readily available to him.

xx. LT H then called [redacted] to testify on Petitioner's behalf. Much of his testimony repeated what he had said at Petitioner's recent special court-martial. He also stated that in Petitioner's case, alcoholism preceded PTSD, "so PTSD did not cause his alcohol dependence but it certainly made it more difficult for him to deal with alcohol dependence," and "made it very easy for (Petitioner) to continue to drink unless he had an awful lot of help for his alcohol dependence and unless he got treated for his PTSD." When asked whether he had any idea why he wasn't referred to the individuals treating PTSD when he received Level III treatment in 1985, [redacted] replied "incompetence." Commenting on whether Navy medicine handled Petitioner's

treatment over the years, he said, "It was not handled properly. It was not handled at all." He further testified that it was absolutely imperative to treat both the PTSD and the alcohol dependence, and that in treating the latter but not the former "you bang your head into a stone wall." On cross-examination, [redacted] acknowledged that in 1985, prior to attending Level III, Petitioner told his command's medical officer that Vietnam memories bothered him only when he was drunk, and he was able to deal with those memories when sober. However, [redacted] went on to say that this doctor was not qualified to diagnose PTSD. [redacted] also was aware that while at FASOTRAGRUPAC just prior to Level III, Petitioner was under stress because of job frustrations. However, he pointed out that many factors may motivate an individual to overindulge in alcohol. [redacted] said that the Level III evaluators were deficient in failing to diagnose PTSD and referring him to a veterans' center in San Diego when he worked at Warner Springs and he did not have a car. The recorder then pointed out that the Level III personnel would not have been aware that he did not have a car and, in fact, would have thought he did since the precipitating incident was a situation in which Petitioner tried to drive while drunk. [redacted] also said that he was unaware that Petitioner had undergone counseling with Joanne K in 1992, or that she had suggested that he attend a veterans' center in Anaheim. [redacted] agreed with the recorder that Petitioner maintained sobriety from September 1992 until April 1994, but pointed out that he did not receive any support for AA meetings from the command aboard GOMPERS. The recorder also pointed out that Petitioner had the ability to abstain since he declined to attend the decommissioning party. Concerning the supposed stressor of landing in an aircraft, the recorder noted that Petitioner arrived at the airport more than eight hours before his plane was to land, and more than six hours before it would take off. When the recorder said that recovering from alcoholism is a personal responsibility, [redacted] said, "Indeed. It is a personal responsibility . . . that can be more or less successful depending on the psychological and physical environment in which one recovers." When asked whether an alcoholic who commits a crime should be relieved of responsibility, [redacted] answered, "Not at all."

zz. When the senior member asked [redacted] how Petitioner could function over the years, given alcoholism, PTSD and the other stressors, [redacted] replied, "With great difficulty." He later elaborated as follows:

> If life was a marathon run, and (Petitioner) was running the marathon, he's been running the marathon on crutches. The fact that his . . . time is not anywhere near the winning time is absolutely, totally irrelevant.
>
> My view of (Petitioner), despite the mud on his uniform, is that (he) is one of our heroes who happens to have a significant flaw in his character. He should be made accountable for his misdeeds. I think that is vital. It

is very important. Not making him accountable for his behavior is wrong. It's enabling him, and that's what the Navy did for the last 11 years. But I believe that we need to acknowledge not just what he did on the record, but what he continues to try to do, even here.

[redacted] then stated that even though Petitioner "was on his last legs as far as the Navy is concerned," he could perform a useful service by telling his story to junior and senior personnel with similar problems and experiences. He also alluded as follows to the failure of naval authorities to give him the help he needed:

> If (Petitioner) had been an engine on an aircraft carrier and the chief engineer treated him the way the medical personnel and the way his commands have treated him, they would all have been court-martialed. They would all have been relieved of their commands because of their neglect of the physical plant.

Subsequently, [redacted] went on to recommend that Petitioner be retained in a limited duty status until he attained 20 years of service and transferred to the Fleet Reserve.

aaa. LT H then called MMCM Rat and RP1 D to testify telephonically on Petitioner's behalf. Both of these individuals attested to his exemplary performance of duty while aboard SAMUEL GOMPERS, and said they would serve with him again despite his two court-martial convictions.

bbb. Petitioner then testified under oath. He described his experiences in Vietnam, including the incident that caused his fear of flying and landing in airplanes, the wound which resulted in the award of the Purple Heart, and the adverse reaction he received when he and other Vietnam veterans returned to the United States. Describing his life as a civilian, he noted that during this period, "I was drinking a lot," and had a hard time finding work. He said that he rejoined the military because "I was lost . . . I couldn't adapt to civilian life." He then stated that in 1985, the very rigorous and stressful SERE training he underwent at FASOTRAGRUPAC brought back memories of Vietnam, and he was identified as having an alcohol problem. He also said that when he was at that command, he was having bad memories of Vietnam and nightmares, but denied having such experiences when interviewed by the medical officer because his wife and children were present during the interview, and he didn't want them to know. Petitioner then said he tried to tell people about his Vietnam problems during his level III treatment, but stated as follows concerning their response:

> . . . Every time I started to talk about Vietnam, they told me to shut up. There was a . . . master chief SEAL in there with the same problem that I had at the same time. Every time we started talking about . . . what happened in

Vietnam, our feelings, they told us to shut up . . . (They said) "Work on alcoholism. That's your disease."

Petitioner then admitted, "I knew I was an alcoholic then." LT H then showed Petitioner a list of all the alcohol related incidents in his Navy career and asked why he started drinking each time. Petitioner replied, "The memories keep coming back." Petitioner then said that he got no treatment in Long Beach, but LT H stopped him and pointed out that [redacted] had suggested he visit the local veterans' center. Petitioner interrupted him and stated as follows:

I don't want to go back to those places. That brings back memories. Those guys. I don't want to see those guys any more. Their faces . . . I might run into some of my friends and maybe they're not dead. You know. I never got to go back to say good-bye. I never got to go back to say good-bye to those guys that died all around me.

When asked whether anyone suggested that he see another doctor, Petitioner replied, "Nobody told me to do anything except to go back to work." He further said that after his first court-martial, he attended AA meetings and tried to help others and said that at that time, he was "doing fine, but I'm still not working the Vietnam problem."

ccc. Petitioner then stated that when he reported to SAMUEL GOMPERS, he tried to keep attending AA meetings, but they were usually held only at midday, his busiest time. Concerning his alcohol related incidents, he said that talk of communism in Hong Kong prompted his first relapse, and Thailand reminded him of Vietnam. However, he also said, "Nobody made me drink. Nobody ever puts a gun to my head and makes me drink. I am responsible for my actions . . ." Turning to the events of 27 October 1995, Petitioner said that the last thing he remembered was sitting at the table in the airport bar with the other chief petty officers. He then said that he wanted to stay in the Navy. When asked by LT H why the ADB should make such a recommendation after the ADB retained him in 1993, Petitioner replied as follows:

For the first time in 30 years, somebody is helping me with the Vietnam issues, at the same time, I'm helping myself with the alcohol issue. I feel very good about myself today. Better. I'm getting better, the doctor tells me. I'm getting well, he keeps telling me, but I need to come home. I have never really come home from Vietnam. Whatever he means by that, I don't know.

. . . There are a lot of things wrong with me inside that I'm just now starting to get in touch with because of [redacted] . . . Nobody likes to call themselves dysfunctional or admit they have a disease . . . I have a disease . . . I thought (PTSD) was some crazy Vietnam vet that went out and . . . killed people and gave the Vietnam

> veterans a bad name . . . I didn't know it was the self-remorse. You don't care about life anymore. You want to die sometimes. You lose all consciousness of reality. You can't make love to your wife because you're impotent . . . You can't sleep at night sometimes . . . This constant memory of death and killing and pain and anger . . .

ddd. On cross-examination, Petitioner acknowledged that he knew that when he drank, he behaved improperly, and did not find out about this misconduct until later. The recorder then pointed out that in 1992, he committed indecent assault but then "straightened out your act for a good long time after that event . . ." Petitioner acknowledged this was true, and attributed his abstinence to the woman he married at that time, who "kept me sober." The recorder returned to his earlier point, and the following colloquy then ensued:

> Q. My point is . . . that you knew, when you got drunk, when you picked up those drinks (on 27 October 1995) you knew that you would do things that you wouldn't remember and you would simply regret later, isn't that correct. . .?
>
> A. If I drink, do I know that I am going to do these things? No sir.
>
> Q. You didn't know that? You have no idea?
>
> A. At the time I drink, I didn't.
>
> Q. Well, you didn't know that you are going to them (at) that particular time but what you did know is that you had a weakness that when you drank you were susceptible to doing things, first of all, that you wouldn't remember and, second of all, that you would be ashamed of later, isn't that true?
>
> A. Sir, this is true. But the point I am trying to get across is there is no mental defense against the first drink for an alcoholic who is in relapse.

Petitioner then admitted that due to training he received at AA, he knew he should not tempt fate by going into the airport bar, but "I sat down to say good-bye to the chiefs." Concerning his decision to start drinking, he said, "I don't know why I picked up the beer . . . I knew that it was a beer, but I cannot tell you why I picked it up." However, Petitioner then reiterated, "I am responsible for my actions whether I am drunk or sober." When the recorder asked Petitioner, if he were retained, how it would be different from the aftermath of the 1992 incident, Petitioner replied as follows:

> For the first time in my life, in 49 years, I'm learning something about . . . (what's) going on inside of me, that's been going on inside of me that I have suppressed

> for 49 years . . . (F)or the first time somebody else is telling me what might be causing me to drink.

eee. After the members of the ADB questioned Petitioner, the defense rested. The recorder and Petitioner's counsel, LT H, then made final arguments to the ADB. During his argument, LT H mentioned the military judge's comment at the recent court-martial to the effect that an unsuspended BCD was inappropriate for Petitioner because he had been wounded in Vietnam. After arguments, the ADB members went into closed session for deliberation. About an hour later, the ADB reconvened in open session, and the senior member announced the following findings and recommendations:

> The findings of the (ADB), based on the preponderance of the evidence for each allegation, the (ADB) found that, by a vote of three to zero, the respondent has committed misconduct due to commission of a serious offense, as evidenced by its (sic) court-martial conviction.
>
> By a vote of three to zero, the respondent has committed alcohol abuse rehabilitation failure.
>
> Specific evidence considered relating to acts, omissions or circumstances alleged in the letter of notification included: First, the conviction at court-martial; Second, multiple documented alcohol incidents after completion of Level III Alcohol Treatment; and Third, continued use of alcohol, failure to stay within the guidelines of aftercare treatment.
>
> Recommendation, by a vote of three to zero, the (ADB) recommends separation . . .
>
> And by a vote of three to zero, the characterization of discharge recommended is a General.
>
> I would just like to comment on the characterization, even though we felt that the court-martial, in and of itself, was enough to (warrant an other than honorable discharge), we wanted to make sure that (Petitioner) has all options open to him at (DVA) and that a general discharge would at least give him the options to receive treatment for PTSD completely and fully.

The senior member then adjourned the ADB.

fff. On 4 April 1996 LT H submitted a letter of deficiency to the Chief of Naval Personnel. In that letter, he reiterated his contention that he had not been afforded sufficient time to prepare for the ADB. In addition to restating the information he provided in his letters to the CO and his comments to the ADB, LT H stated as follows:

. . . I was stunned to read (the brig CO's letter of 28 March 1996) and learn that my CO had represented that I had sufficient time to prepare--despite the fact that he had never discussed the case with me. My CO later explained to me that his representation had only been that based on his knowledge of my case load and the number of days between notification and (ADB), I should have had enough time. He did not consider my duties to the other client during the conflicting court-martial.

Counsel also pointed out that although he represented Petitioner at trial, the recorder called several witnesses who did not testify at the court-martial. He then stated "I was wholly unprepared to deliver a meaningful cross-examination of persons to whom I had never spoken. While I 'winged it' to the best of my ability, the respondent was nonetheless denied his right to representation by competent counsel." LT H also complained that the government brought in witnesses to testify in person, but failed to honor his request for witnesses. He further contended that the discharge action constituted a violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution.

ggg. The brig CO replied to LT H's letter of deficiencies by endorsement of 10 April 1996 and stated as follows concerning the contentions in that letter:

LT (H) alleges that he was given insufficient time in which to prepare for this (ADB). I am completely satisfied that LT (H) had ample time to prepare . . . I delayed the (ADB) from 20 March 96 to 29 March 96 pursuant to LT (H's) request. I also informed LT (H) that if he requested further delay I would consider that request when it was submitted. Upon receipt of LT (H's) request for delay, I contacted LT (H's) (CO), in order to assist me in determining whether additional delay was warranted. After considering all the circumstances, I determined that the (ADB) would proceed on 29 March 96 as scheduled.

The recorder did present testimony from several people who did not testify at the court-martial. The majority of these witnesses were people who worked with or knew (Petitioner) earlier in his career. The verbatim record contains more than enough evidence that LT (H) was able to, and did, ask meaningful cross-examination questions.

The record shows that the Recorder and Respondent each called two witnesses to testify in person at the (ADB). One of the Recorder's live witnesses, IC3 (S), had remained in the San Diego area after the court-martial. The other, MM3 (H), was flown in from Norfolk. The live witnesses called by the Respondent were LCDR (L), (Petitioner's) former (XO) who testified strongly on (Petitioner's) behalf, and [redacted] who testified concerning (PTSD).

LT (H) states that he had no time to contact the witnesses he intended to call. He did have the opportunity to talk to the witnesses in preparation for the court-martial, and certainly knew what the nature of their testimony would be when he requested their presence at the (ADB).

If he had wanted to, LT (H) could have drafted a short memorandum stating why he felt his requested witnesses were essential. Nevertheless, the record shows that in person testimony was not "essential to a fair determination of the issues of separation or characterization." See MILPERSMAN 3640350.1c. The Respondent was not forced to rely on written statements or recorded testimony; rather, he was allowed to elicit testimony via telephone. The Respondent's witnesses testified strongly in (Petitioner's) behalf, and there is nothing that would have been added by their physical presence. As well, the majority of the Recorder's witnesses also testified via telephone. (emphasis in text)

The CO went on to opine that LT H's claim of double jeopardy also was without merit.

hhh. On 11 April 1996 the brig CO forwarded the case to CNP, concurring in the findings and recommendations of the ADB. The CO also recommended that Petitioner be referred to Naval Medical Center, San Diego, CA for Level III alcohol rehabilitation prior to discharge. In this regard, 10 U.S.C. § 1090 requires that the services treat and rehabilitate those servicemembers who are alcohol dependent. The record reflects that both before and after the case was submitted to CNP, there was considerable debate within the Bureau of Naval Personnel about whether Petitioner was entitled to such treatment and, if so, how it should be accomplished. Subsequently, the Assistant CNP for Military Personnel submitted a memorandum to CNP recommending that Petitioner be separated with a general discharge. On 30 April 1996 CNP, acting in his capacity as Deputy CNO, directed a general discharge and also designated misconduct as the reason for separation.

iii. On 1 May 1996 Petitioner was advised that he was being separated with a general discharge by reason of misconduct, and was also told that "you are being offered Level III treatment prior to your release from active duty." However, Petitioner declined to participate and stated that he was happy with the treatment he was receiving from CAPT Reyes. Accordingly, on 12 May 1996 Petitioner received a general discharge by reason of misconduct. At that time, he had about 18 years and 4 months of active service.

jjj. Petitioner applied to the Board in May 1999. Through counsel, he makes the following contentions of error:

Because of the command climate surrounding his case, he was denied his right to a fair, impartial and unbiased ADB.

LT H's ability to properly and thoroughly represent him during the administrative separation processing was irretrievably impaired because of the brig CO's failure to grant the request to delay the ADB.

Although the government was permitted to have its witnesses testify before the ADB in person, he was improperly denied this right, and some of his witnesses were compelled to testify by telephone.

The ADB failed to follow the guidance in the Naval Military Personnel Manual (MILPERSMAN) in making its findings of misconduct and alcohol abuse rehabilitation failure, and the evidence of record fails to substantiate the latter finding.

Processing him for separation by reason of alcohol rehabilitation failure was so unfair as to amount to an abuse of discretion since he had not been referred for treatment in over ten years and could not have been so processed during most of that period, and since his treatment was inadequate in that it failed to address his PTSD.

His discharge was punitive in effect and, accordingly, it violated the prohibition against double jeopardy in the Fifth Amendment to the Constitution.

His discharge violated 10 U.S.C. § 1176(a) because that statute guaranteed that a regular enlisted member with 18 years of active service could remain on active duty until eligible to transfer to the Fleet Reserve.

The government acted arbitrarily and capriciously in discharging him given the incompetent medical care he received for ten years, the failure to treat him for PTSD when he returned from his last deployment aboard SAMUEL GOMPERS, and since the discharge constituted an overreaction in the aftermath of the Tailhook incident.

In attachments and a supplement to his application, Petitioner has submitted evidence of a good post-service adjustment. In this regard, a report from the Federal Bureau of Investigation (FBI) reveals that he has not been arrested or convicted of any offenses since the second conviction by special court-martial.

kkk. Petitioner also has submitted documentation that in February 1997, he was diagnosed with PTSD by the Department of Veterans Affairs (DVA) and, one month later, DVA rated his PTSD as 30% disabling. Accordingly, an advisory opinion was requested on the issue of whether the PTSD would have warranted retirement

by reason of physical disability and, if so, at what percentage of disability. By letter of 20 July 2000, the Director of the Naval Council of Personnel Boards (NCPB) initially notes that Petitioner's alcoholism pre-dated his military service and, by implication, his PTSD. Further, the in-service diagnosis of PTSD is insufficient to find a ratable disability absent "non-medical evidence of consequent sustained significantly impaired duty performance." Accordingly, the Director, NCPB opines that despite the diagnoses of PTSD in the record, Petitioner would have been found fit for duty because his duty performance "remained exemplary up until less than 1 month before the incident that led to his administrative separation." Petitioner's counsel, in his letter of 21 August 2000, asserts that the NCPB advisory opinion is "predicated upon (Petitioner's) disability being alcoholism manifested by PTSD. In fact, the (opinion) has it backwards because (his) disability at the time of his separation was PTSD manifested by alcoholism." Counsel further states that "if his performance was at all times really exemplary until less than one month before separation, no one would have spent so much time at the court-martial and ADB talking about things from long ago and far, far away."

lll. A member of the Board's staff spoke with LT H, Petitioner's military defense counsel, about his alleged inability to mount a defense at his client's ADB due to the denial of his request for a delay in the proceedings. A memorandum for record (MFR) of 6 April 2000 was prepared to reflect that conversation. It was pointed out that although the CO denied the request for a continuance beyond Friday, 29 March 1996, the ADB was recessed early due to a fire, thus giving him a weekend to prepare. LT H stated that he used the weekend to interview his own witnesses, but not the government witnesses, some of whom did not testify at the court-martial. He also noted that by the time the ADB was recessed on Friday, the government had put on much of his case. He was also asked about his failure to introduce in evidence the stipulations from the court-martial which dealt with the alcohol problems aboard SAMUEL GOMPERS. LT H could not recall why he did not do so, but speculated that since LCDR L was a defense witness, he may have decided not to be unduly critical of those in command positions aboard that ship.

mmm. The version of MILPERSMAN Article 3640350.1b in effect at the time of Petitioner's separation processing required that members of an ADB be "well qualified by reason of . . . judicious temperament . . . " Further, such individuals "should not have a preconceived notion regarding the findings and recommendations to be made relative to a particular respondent's case." If the respondent or his counsel believed that an individual appointed to an ADB does not meet the foregoing criteria, the member could be challenged for cause.

nnn. MILPERSMAN Article 3640200.3f stated that an ADB should not be "unduly delayed" in order to permit attendance either by military or civilian. Undue delay was defined any delay which

would prevent the ADB from meeting within 35 days from the day the respondent was notified of the administrative separation action. The CO could authorize an additional delay, with the concurrence of the senior member of the ADB, "upon timely showing of good cause by the respondent." A prior commitment of counsel was listed as an example of "good cause."

ooo. Article 3640350.3c covered the respondent's right to request witnesses at an ADB, and required that such a request be submitted as soon as the need for the witness is known, along with a synopsis of the witness' expected testimony. If the witness request was denied, the ADB could be delayed in order to obtain a written statement from the individual.

ppp. Concerning an ADB's findings and recommendations, Article 3640350.5b required an ADB to state the specific evidence it considered relating to each act alleged, its determination for each such act, and the specific reason for separation which pertains to each act. However, Article 3610260.7 stated that in a case such as Petitioner's, the approved court-martial conviction established the underlying facts beyond a reasonable doubt, and an ADB may not render its own findings on those matters.

qqq. Until 1993, Article 3630550 stated that an individual could be separated due to alcohol abuse rehabilitation failure if he or she failed to participate in, cooperate in or complete such rehabilitation and there was no potential for further service. In 1993, the article was modified to authorize separation for an individual without such potential who has an alcohol incident at any time in his or her career following completion of Level III treatment. This change in the MILPERSMAN echoed paragraph 3c of enclosure (6) to the September 1990 version of the Navy's governing directive on Alcohol and Drug Abuse Prevention and Control, Chief of Naval Operations Instruction (OPNAVINST) 5350.4B. Other provisions of that enclosure to the directive authorized a second Level III treatment for senior enlisted individuals upon approval by the Commander, Naval Military Personnel Command. However, the matrix at Appendix A to enclosure (7) of the regulation stated that a third alcohol incident during a career generally meant the individual had no potential, and should be separated.

rrr. MILPERSMAN Article 3610260.3 states that an individual must be processed for separation for all reasons for which the minimum criteria are met, in order that the separation authority may "approve separation for the most appropriate reason." Article 3630370.1a essentially directs CNP to do just that if an ADB finds more than one reason to be substantiated.

sss. Article 3610260.8 set forth a number of factors that could be considered by the ADB and separation authority on the issue of whether an individual should be discharged or retained in the service. Concerning adverse documentation from a prior

enlistment, this article stated that such material is admissible if it would "have a value in determining whether separation is appropriate." The article further stated that isolated incidents "normally have little value," and the use of such material "should be limited to . . . patterns of conduct manifested over a period of not less than 90 days."

ttt. The Supreme Court's rule for deciding whether a sanction was civil or criminal, for the purpose of determining whether multiple punishments had been imposed in violation of the Fifth Amendment's Double Jeopardy Clause, is set forth in *United States v. Ward*, 448 U.S. 242 (1980) and reaffirmed in *United States v. Hudson*, 522 U.S. 93 (1997). The threshold issue is whether the legislature intended to establish a civil or criminal penalty. Even if the legislature intended a civil penalty, the statutory scheme must then be examined to determine whether is so punitive, either in purpose or effect, as to transform the civil remedy into a criminal penalty. *Ward*, at 248-49. In making the latter determination, relevant factors include whether the sanction involves an affirmative disability, whether it has historically been viewed as punishment, whether it comes into play only upon a finding of *scienter*, whether its operation promotes retribution and deterrence, whether the behavior to which it applies is already criminal, whether an alternative purpose to which it may be connected is assignable to it, and whether it appears excessive in relation to such an alternative purpose. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). However, these factors were to be evaluated in relation to the statute on its face. *Id.*, at 169. Further, only clear proof would suffice to override legislative intent and transform a civil penalty into a criminal sanction. *Ward*, at 249.

uuu. Upon enactment in 1992, 10 U.S.C. § 1176 stated, in pertinent part, as follows:

> **(a) Regular members.** A regular enlisted member who is selected to be involuntarily separated, or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is within two years of qualifying for . . . transfer to the . . . Fleet Marine Corps Reserve . . ., shall be retained on active duty until the member is qualified for transfer . . . unless the member is sooner retired or discharged under any other provision of law.
>
> **(b) Reserve members.** A reserve enlisted member serving on active duty who is selected to be involuntarily separated, or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged or released from active duty is entitled to be credited with at least 18 but less than 20 years of service under section 1332 of this title, may not be discharged or released from active duty without the member's consent before the earlier of the following . . .

[National Defense Authorization Act for Fiscal Year 1993, Pub.L. 102-484, § 541(a), 106 Stat. 2412 (1992).]

In 1993, the foregoing part of § 1176(b) was amended to read as follows:

> **(b) Reserve members in an active status.** A reserve enlisted member serving in an active status who is selected to be involuntarily separated (other than for physical disability or for cause), and who on the date on which the member is to be discharged or transferred from an active status is entitled to be credited with at least 18 but less than 20 years of service computed under section 1332 of this title, may not be discharged, denied reenlistment or transferred from an active status without the member's consent before the earlier of the following . . .
> [National Defense Authorization Act for Fiscal Year 1994, Pub.L. 103-160, § 562(a), 107 Stat. 1669 (1993).]

vvv. 10 U.S.C. § 1169(1) states that an enlisted servicemember may be discharged before the expiration of an enlistment as prescribed by the applicable service secretary. Accordingly, the Secretary of the Navy promulgated Secretary of the Navy Instruction (SECNAVINST) 1910.4A, which set forth policies and procedures for enlisted administrative separations in the Navy and Marine Corps at the time of Petitioner's discharge. At the time of Petitioner's discharge, the Navy implemented this directive in Chapter 36 of the MILPERSMAN, some provisions of which are referenced in the foregoing paragraphs.

www. 10 U.S.C. § 6330 sets forth the general rule that an individual may only be transferred to the Fleet Reserve after 20 years of active military service. However, section 4403(b)(2) of Public Law 102-484, as amended, provides SECNAV with Temporary Early Retirement Authority (TERA), in Fiscal Years 1993 through 2001, to so transfer servicemembers with 15 or more years of active service. In implementing TERA, the Navy disqualified those individuals who were facing administrative separation or not recommended for reenlistment. Further, only individuals serving in certain ratings and pay grades were eligible, and it is unclear whether Petitioner met these criteria.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial relief. In this regard, the Board rejects most of counsel's contentions of error. However, the Board also believes that to discharge Petitioner was overly harsh given his many years of good service, his well-documented case of PTSD, and the Navy's failure to treat this disorder for about ten years.

The Board rejects counsel's contention that command influence deprived Petitioner of an ADB whose members were fair and impartial. In considering this issue, the Board realizes that Petitioner's case received a great deal of unfavorable publicity in November 1995, more than four months before the ADB, and the segment on 20/20 was televised only about a month before the hearing. However, it is clear from the ADB record that both the recorder and LT H were concerned about the possible effect this publicity might have on the independence and impartiality of the ADB, since both attorneys engaged in a fairly extensive *voir dire*. During this questioning, all three voting members stated that no one had tried to influence them, they could consider the case on a fair and impartial basis, and they would not be influenced by the pre-ADB publicity. Additionally, none of the members had seen the 20/20 segment, and two of them were not even aware of it.

It is also significant to point out that when given the opportunity to challenge any or all of the voting members for cause, LT H declined to do so. This appears to have been the correct course of action given the members' responses to the questions put to them, and the fact that except for the 20/20 segment, which none of them had seen, Petitioner's case was almost old news. In addition, the ADB showed its independence by recommending a general discharge instead of the more stigmatizing characterization of under other than honorable conditions. Based on the foregoing, it is clear to the Board that in accordance with MILPERSMAN Article 3640350.1b, Petitioner's case was decided by members whose judicious temperament had not been impaired by any preconceived notions about his case.

In his brief, counsel contends that one member of the ADB was actually biased against Petitioner because of a remark he made to the effect that PTSD was used too often as a defense to misconduct. However, the member also qualified his comment by saying that PTSD was being misapplied to everyday occurrences when it was actually related to combat. Whether this comment was right or wrong, it certainly did not prejudice Petitioner since it is clear that his PTSD was brought on by combat experiences in Vietnam.

The Board cannot so easily dismiss the contention that LT H could not properly represent Petitioner because of inadequate time to prepare his case. LT H was initially successful in postponing the ADB from 20 to 29 March 1996. However, he advised the CO on 27 March 1996 that his court-martial was taking longer than expected, would stretch into the following day, and requested a further delay of five days, until 3 April 1996. Such a delay would still have permitted the ADB to meet within 35 days of the date Petitioner was notified of separation proceedings, as mandated by the MILPERSMAN Article 3640200.3f. LT H even said that he would try to accommodate the command by postponing scheduled medical appointments on 1 and 2 April 1996 in order that the ADB could be held on one of those days. Taking all of

the foregoing into consideration, the Board concludes that LT H's request was eminently reasonable, should have been granted, and the failure to do so constituted an abuse of discretion. The fact that the CO may have been misadvised by LT H's superior does not alter the Board's conclusion, since LT H provided the CO with the correct information. Along these lines, the Board also notes that his court-martial not only took up all of the day preceding the ADB, 28 March 1996, but went well into that evening. Accordingly, LT H had only a few hours to prepare for an ADB that might (and did) result in the administrative discharge of a servicemember with more than 18 years of service. Nevertheless, this conclusion does not necessarily mandate a recommendation for relief, given the fundamental tenet of administrative law that an action will not be invalidated unless the error at issue is deemed prejudicial, and a harmless error will not result in reversal. An error may be deemed harmless only if the reviewer is convinced that the error did not influence the final decision, or had only a very slight effect. *Kotteakos v. United States*, 328 U.S. 750 (1946); *United States Steel Corporation v. Environmental Protection Agency*, 595 F.2d 207 (5th Cir. 1979); *Burd v. United States*, 19 Cl.Ct. 515 (1990). The Board believes that despite the lack of time to prepare, LT H was able to provide effective representation for his client.

LT H certainly had a difficult task before him at Petitioner's ADB. However, he obviously was very familiar with the case since he represented Petitioner at the special court-martial. It is also important to note that although the ADB met on 29 March 1996 and preliminary matters were disposed of, only three witnesses testified on that day. One of those witnesses, LCDR L, testified for the defense. Only two witnesses, ET2 A and CAPT J, testified for the government before the ADB was recessed for the weekend. On the following Monday, the government elicited testimony from Ms. K, CAPT G, MM3 H and IC3 S. Accordingly, LT H had the weekend to prepare before the government put on most of its case. This is significant to the Board given LT H's statement to the ADB that he could be ready on Monday, or even over the weekend.

The Board also believes that no showing has been made that even if given additional time, LT H could have introduced any additional evidence or better impeached any of the government's witnesses such that the ADB's findings or recommendations would have been more favorable. Some of the stipulations from members of SAMUEL GOMPERS crew pertaining to the use and abuse of alcohol aboard the ship were not introduced. However, LT H apparently had a good reason for his failure to do so, a desire not to unduly criticize the command of SAMUEL GOMPERS since LCDR L was testifying on Petitioner's behalf. Further, the command's lax attitude on alcohol deglamorization came out when ET2 A testified to that effect. Contrary to counsel's contention in his brief, the ADB was made aware of the comments of the military judge in sentencing Petitioner at the court-martial, because LT H referred to them in his closing argument. Concerning the contention that had LT H had adequate time to prepare, he would have a favorable

result at the ADB just as he did at the court-martial, the Board noted that the testimony of CAPT Reyes was blunted at the ADB by that of CAPT Gill, who did not testify at the judicial proceeding. Finally, the record shows that LT H, despite his lack of time to prepare, effectively cross-examined government witnesses and elicited information that was favorable to his client. Taking all of the foregoing into consideration, the Board believes that to the extent that LT H had to "wing it" at the ADB, he did so successfully.

The Board also rejects the contention that Petitioner was improperly denied his right to have witnesses testify at the ADB, and essentially concurs with the CO's comments on this subject in his letter of 10 April 1996. It is especially important to note that every witness requested by LT H did, in fact, testify to the ADB. However, some of those individuals had to testify by telephone and not in person. Under the circumstances of this case, the Board finds that this was not inappropriate, especially since LT H apparently did not provide a summary of expected testimony as required by the MILPERSMAN. Under some circumstances, it may be vital for the finders of fact to have witnesses appear live and in person in order that their credibility may be weighed. In this case, however, there were no contested issues of fact, and the most important issue was whether the undisputed facts warranted Petitioner's discharge. Since there was no question that Petitioner committed misconduct as alleged, his ADB was roughly analogous to the sentencing portion at a court-martial, at which telephonic testimony is admissible. *United States v. McDonald*, 53 M.J. 593 (N.M.Ct.Crim.App. 2000). Finally, the Board cannot conclude that it was prejudicially unfair for the government to bring in one of the victims of Petitioner's misconduct from a distant location to testify in person at the ADB.

The Board rejects Petitioner's contention that MILPERSMAN Article 3640350.5 was violated to his prejudice because the ADB failed to comply with its requirements for making findings. Along these lines, the Board noted that he was processed for separation by reason of misconduct due to commission of a serious offense, as evidenced by the special court-martial conviction of 28 February 1996. In accordance with MILPERSMAN Article 3610260.7, that conviction was binding on the ADB. Therefore, any technical noncompliance with Article 3640350.5 clearly was not prejudicial.

The Board also noted Petitioner's allegations that it was blatantly unfair to process him by reason of alcohol rehabilitation failure, there was insufficient evidence to show that he met the requirements for that reason set forth in MILPERSMAN Article 3630550, and the ADB's findings were insufficient. The Board is aware that Petitioner completed his only period of inpatient, Level III, alcohol rehabilitation in 1985, more than 10 years before his was processed for separation, and he was never entered into any sort of refresher rehabilitation. Further, separation in such a case was not

authorized by OPNAVINST 5350.4B until 1990 and not until 1993 was it authorized by the foregoing article in Chapter 36 of the MILPERSMAN. However, the Board believes it is irrelevant whether Petitioner was properly and appropriately processed due to rehabilitation failure since he was actually separated by reason of misconduct.

In initiating separation action, the CO elected to process Petitioner by reason of misconduct due to commission of a serious offense, and by reason of alcohol abuse rehabilitation failure, obviously believing that the minimum criteria for both reasons were met and, accordingly, such processing was required by MILPERSMAN 3610240.3. The ADB found both reasons to be substantiated, and so found. However, CNP, as separation authority, exercised his authority under Article 3640370.1d and chose misconduct as the reason for separation. That is the narrative reason for separation appearing on his Certificate of Release or Discharge from Active Duty (DD Form 214). Since misconduct is the reason for separation now of record, and that reason is clearly substantiated by the court-martial conviction, it is of no moment whether or not Petitioner met the requirements for separation due to alcohol rehabilitation failure.

The Board wishes to point out that even if it was incorrect to process Petitioner by reason of alcohol abuse rehabilitation failure, the evidence of his problems with alcohol would have been admissible at the ADB. Petitioner was also processed for separation by reason of misconduct due to commission of a serious offense, as evidenced by the 28 February 1996 court-martial conviction. The offenses of which Petitioner was convicted were clearly alcohol related. Accordingly, given the provisions of MILPERSMAN Article 3610260.8, his prior pattern of alcohol abuse would have been relevant on the issue of whether he should be retained or separated. It is interesting to the Board that both the government and the defense probably would have wanted to get this evidence before the ADB--the government to show the prior pattern of alcohol abuse, the defense to show that Petitioner was never treated for PTSD.

The Board also found no merit to the contention that imposition of a general discharge after Petitioner's court-martial conviction constituted impermissible multiple punishment under the Double Jeopardy clause of the Fifth Amendment. Using the analysis set forth in *Ward v. United States* and *Hudson v. United States,* both *supra*, the Board does not believe that the general discharge by reason of misconduct constitutes double jeopardy. In this regard, the Board concludes that Congress never intended to create a criminal sanction when it authorized administrative separations from the military. In enacting the UCMJ, Congress prescribed a criminal code for the military and authorized bad conduct and dishonorable discharges and dismissals, all of which are clearly punitive in nature. However, in 10 U.S.C. § 1169(1), Congress authorized the service secretaries to terminate an individual's service without resorting to the criminal process of

the UCMJ. Accordingly, Congress never intended that such a separation be viewed as punitive. Additionally, the Board concludes that neither Petitioner's general discharge nor the general scheme of administrative separations is sufficiently punitive, in purpose or effect, to transform either one into a criminal sanction. Administrative discharges, especially general discharges, have never been viewed as punitive.

The Board finds no merit to counsel's contention that 10 U.S.C. § 1176 precluded Petitioner's discharge. The last sentence of § 1176(a) states that its 18-year safety zone for a regular enlisted member is inapplicable to a servicemember discharged "under any other provision of law." § 1169(1) provides for discharge such a member prior to the expiration of a term of service, as prescribed by the service secretary. SECNAVINST 1910.4B implements § 1169 by providing policy and guidance on enlisted administrative separations in the Navy Department. Accordingly, Petitioner was discharged under another provision of law, and the safety zone in § 1176(a) did not apply to him.

In his letter of 24 April 2000 which supplements his brief, counsel argues that the foregoing interpretation of § 1176(a) is erroneous in that it "results in the sanctuary provisions of Section 1176(a) having no meaning", because §1169 provides the only basis for the involuntary separation of enlisted servicemembers for cause, and if those servicemembers are excepted from the protection of §1176(a), there is no one left to protect. The Board disagrees. Clearly, Congress intended that § 1176(a) apply to some class of servicemembers. The Board believes it applies to an individual who attains 18 years of service, and is not permitted to reenlist upon the expiration of his enlistment. Such an individual is not separated for cause, but by reason of expiration of enlistment.

Additionally, the legislative history of § 1176(a) indicates that this provision of law was intended to "provide the same tenure protection to enlisted members that is afforded under current law to officers who have completed 18 but less than 20 years of active duty for retirement eligibility purposes." H.Conf. Rep. No. 102-966, 102nd Cong., 2nd Sess. 709, *reprinted in* 1992 U.S.C.C.A.N. 1636, 1800. Such protection is afforded for regular officers in 10 U.S.C. §§ 631 and 632, both of which provide for the involuntary discharge of officers who twice fail to be promoted unless they have 18 years of service, in which case they are retained until they attain retirement eligibility. However, both statutes state that the 18-year safety zone is inapplicable if an officer is "sooner retired or discharged under another provision of law." Accordingly, just as administrative separation of a regular officer for cause, as provided for in Chapter 60 of Title 10, is not precluded by §§ 631 or 632, Petitioner's discharge for cause under § 1169 and the implementing directives was not affected by § 1176(a).

Counsel further contends that by amending §1176(b), but not §1176(a), in 1993 to specifically exclude reservists separated "for cause" from the 18-year sanctuary, Congress clearly intended that regular enlisted members who would otherwise be so separated remain protected by the sanctuary. Once again, the Board cannot concur. As originally enacted, § 1176(b) only applied to reservists on active duty. However, the 1993 amendment broadened this section to include all reservists in an active status, thus covering not just those reservists on active duty but also those participating in reserve activities such as drilling and active duty for training. Such was clearly the primary intent of Congress in enacting this amendment, and it was viewed as "technical and conforming". S. Rep. 103-112, 103rd Cong., 1st Sess. 145; H. Conf. Rep. 103-357, 103rd Cong., 1st Sess. 679, *reprinted in* 1993 U.S.C.C.A.N. 2013, 2281. There is no indication that Congress intended to set up a different sanctuary for reservists and regulars. Both reserve and regular enlisted members are now subject to administrative separation prior to the expiration of enlistment. § 1176(a) allows such action for regulars because it is provided for "under any other provision of law," specifically, § 1169. § 1176(b) specifically authorizes separations "for cause."

In reaching its conclusion that partial relief is warranted, the Board wishes to emphatically state at the outset that it does not in any way condone the misconduct that led to Petitioner's 1992 and 1995 convictions by court-martial. In both cases, the offenses were serious and fully warranted the disciplinary action taken. Ordinarily, the Board would have absolutely no problem with the administrative separation of an individual with two court-martial convictions, let alone convictions for the sort of offenses committed by Petitioner. However, the Board believes this is far from an ordinary case.

At the time of Petitioner's separation, he had served for over 18 years. As previously noted, this fact does not raise a legal bar to administrative separation. However, on the basis of equity and fairness, the Board has a certain degree of sympathy for any individual who serves for so long and is denied the opportunity to retire. Additionally, other factors make the Board especially sympathetic to Petitioner's plight. He not only served the nation in combat while in Vietnam, he shed blood in doing so. To a lesser degree, he went in harm's way during Operation Desert Shield/Storm. The record also reflects that even during peacetime, he always performed his duties in an exemplary manner; at times, even to the extent that he became virtually "mission essential."

Another significant mitigating factor in Petitioner's case is his PTSD. Although there may be a certain amount of skepticism in the general public about the legitimacy of mental disorders such as PTSD, this diagnosis is now well recognized in the medical and psychiatric communities. The disorder is listed and discussed in the American Psychiatric Association's *Diagnostic and Statistical*

Manual of Mental Disorders (4th Ed. 1994). The Board also believes that even if the disorder may be over-diagnosed--found to exist in situations in which the precipitating trauma is not terribly severe, Petitioner's PTSD clearly resulted from his combat experiences, a more-or-less "classic case" of the disorder. The Board also credits the testimony of [redacted] to the effect that the effects of PTSD may be severe and have a significant adverse impact on an individual's ability to live a fully normal life. It is also clear to the Board that PTSD can be especially debilitating if the individual is also an alcoholic.

The Board has no doubt that Petitioner was correctly diagnosed with chronic PTSD by [redacted] in November 1995 and in the January 1996 sanity evaluation. These diagnoses were also confirmed by DVA's post-service evaluation. These formal diagnoses merely served to confirm what had been alluded to in medical and mental evaluations since 1985. Although Petitioner's untreated PTSD did not make treatment for his alcoholism impossible, it generally made such treatment more difficult and less likely to succeed and, specifically, made it more difficult for him to abstain from alcohol use and abuse. The Board also accepts the testimony of [redacted] to the effect that Petitioner's undiagnosed PTSD played a significant part in the offenses of 27 October 1995 which resulted in his second court-martial conviction.

However, the Board does not believe that Petitioner's service record and his PTSD are sufficient, standing alone, to warrant a recommendation for relief. Although Petitioner's lengthy period of service is mitigating, the Board expects an individual serving as a chief petty officer to set an example for others, and not commit the serious offenses which resulted in his discharge. Additionally, neither Petitioner's alcohol abuse nor the diagnosed PTSD, nor a combination of the two, excused him of responsibility for misconduct. No one has suggested that Petitioner was not responsible for his actions, indeed, even he acknowledges that he was responsible and needed to be held accountable. Further, PTSD was obviously viewed as a mitigating factor at Petitioner's second court-martial because he received considerably less than the maximum punishment authorized by the UCMJ. It could be argued that he was shown some consideration when the decision was made to refer the case to a special and not a general courts-martial, at which the potential penalties would have been far greater. Additionally, the PTSD influenced the ADB since a general discharge was recommended in lieu of the more stigmatizing discharge under other than honorable conditions.

There is, however, more to Petitioner's case than lengthy service, good performance and an alcohol problem aggravated by PTSD. The additional factor was aptly characterized by [redacted] as negligence on the part of the medical and line communities. There were numerous opportunities to treat Petitioner's PTSD, but the Navy let him down every time. This is

the additional factor which leads the Board to believe that relief is warranted in Petitioner's case.

The first slip-up occurred in 1985, after Petitioner realized he had an alcohol problem, voluntarily referred himself to medical authorities, and was sent for his first and only period of in-patient treatment at the ARC in San Diego. At that point, the Navy had a golden opportunity to "kill two birds with one stone." The ARC was located in the same building as the program in which [redacted] was helping servicemembers diagnosed with PTSD. Petitioner's medical records at the time did not contain such a specific diagnosis, but they clearly indicated that he was having problems related to his Vietnam service, and suggested that PTSD might be present. Yet, he was not even referred to this facility, and it appears from Petitioner's version of events and the statement of SM1 D, that he was even discouraged from discussing his Vietnam problems. The Board realizes that in an inpatient alcohol rehabilitation program, there is a limited amount of time to provide all of the requisite treatment and cover all of the necessary topics. However, the Board cannot believe that time was so tight that Petitioner could not have been examined by [redacted] or one of other the experts at the PTSD facility. Such an examination would have revealed the seriousness of his problem, he probably would have been put on the road to recovery 10 years earlier than he was. Along these lines, it is important to note that at the time of his in-patient rehabilitation, Petitioner quite clearly was motivated to deal with his alcohol problem and take the necessary steps to remain alcohol free. He completed the in-patient program and the follow-on aftercare period, and had no alcohol related incidents for about two years. It very much appears to the Board that he would have conscientiously applied himself to resolving his problem with PTSD, as he did ten years later with the help of [redacted]

Another golden opportunity to provide Petitioner with the necessary assistance was missed in 1992-93 time frame, after Petitioner's first special court-martial conviction. [redacted] testified at that proceeding that he should go back to an ARC, and further stated that in her opinion, he suffered from PTSD. Yet, aside from referring him to the veterans' center, little or nothing was done. The Board notes the testimony of [redacted] to the effect that in her expert opinion, a "refresher" stint at ARC normally does not help an individual such as Petitioner. Had Petitioner's problem been solely one of alcoholism, the Board would agree. However, had Petitioner been returned to an ARC, one of the professionals at such a facility might well have reviewed his medical records and realized that he needed help with PTSD. This is especially true given Ms. K's belief at the time that he suffered from PTSD.

The Navy's last chance to help Petitioner with his PTSD problem occurred in 1995, shortly before the incident that ended his career. During this time frame, after several alcohol related

incidents, medical professionals aboard SAMUEL GOMPERS echoed their predecessors by making another preliminary diagnosis of PTSD, and said he needed help. Petitioner was then put on a program to deal with his alcohol abuse relapse, consisting primarily of abstinence and attendance at AA meetings. Once again, Petitioner was cooperative. He complied with this program until the incident of 27 October 1995.

Unfortunately, that part of the program that called for subsequent medical help with his PTSD "went by the boards," due to the failure of the command to follow up. Even the XO of SAMUEL GOMPERS, LCDR L, testified that "we blew it." The command not only "dropped the ball" at this point, but failed to take any action after either of Petitioner's alcohol related incidents. The Board is sensitive to the necessity of SAMUEL GOMPERS to meet operational commitments and is aware that at the time, those commitments were burdensome. At the time Petitioner was assessed as needing assistance, the ship was deployed. Upon returning from deployment, the command was confronted with decommissioning, another time consuming and stressful evolution. In an ideal world, it would have been preferable to return Petitioner from deployment to give him the help he needed. However, it appears that at this point, he was victimized by his superb performance of duty. Given the manning situation aboard SAMUEL GOMPERS, he was viewed as a sort of "indispensable man." Accordingly, the Board can understand why he was retained on board for the remainder of the deployment and the decommissioning process. Fortunately, he apparently was so busy that he had no time to become involved in further incidents. Neverthelss, having decided to retain Petitioner on board, the command should have ensured that as soon as the decommissioning was completed, he got the help he needed. Obviously, that was not done and he was merely transferred to his next command, to the detriment of both Petitioner and the Navy.

The Board is not persuaded by the argument that Petitioner received a sort of windfall since he could have been separated long before he was, given the provisions in OPNAVINST 5350.4B and Chapter 36 of the MILPERSMAN. It seems clear that although Petitioner and other similarly situated individuals were eligible for separation in accordance with these directives, it was routine to give these servicemembers numerous second chances if they were good performers. Further, had he received timely help for PTSD, most or all of those incidents likely would not have occurred.

In sum, the Board believes that although Petitioner was accountable and responsible for his misconduct, the Navy also bears some responsibility in this case due to its failure to treat Petitioner's PTSD in a timely manner. Accordingly, since PTSD played a role in the incident that resulted in his discharge, Petitioner was victimized by an injustice. Turning to the specific relief to be granted, the Board cannot justify reinstating Petitioner to the rate of MSC because his reduction

in rate to MS1 was one method the court-martial used to hold him accountable for his misconduct, and the Board believes that was appropriate. Additionally, the Board agrees with NCPB that Petitioner is not eligible for retirement by reason of physical disability. Further, since the Board believes that Petitioner's discharge was unjust but not improper or illegal, the Board also concludes that it would be inappropriate to award constructive service in order to make Petitioner eligible for transfer to the Fleet Reserve with 20 years of service. Accordingly, the Board believes that the fairest resolution to this case would be to substitute a TERA retirement for the discharge of 12 May 1996. Along these lines, the Board notes that such a correction to the record will result in Petitioner's transfer to the Fleet Reserve in the rate of MS1 and not MSC. Further, Petitioner will be credited only with slightly more than 18 years of service and not the 20 years he would have attained absent the administrative discharge. Both of these factors will result in a considerable reduction in his retainer and retired pay, which essentially means that Petitioner will continue to suffer for his misconduct during the rest of his life.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that on 12 May 1996 he was transferred to the Fleet Reserve in the rate of MS1 (E-6) under the provisions of the Temporary Early Retirement Authority, vice the discharge actually issued on that date.

b. That no further relief be granted.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petiioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder

ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.

W. DEAN PFEIFFER

Reviewed and approved:

12/1/00

JOSEPH G. LYNCH
Assistant General Counsel
(Manpower And Reserve Affairs)